United States Court of Appeals

for the Second Circuit

APPENDIX

74-2559

United States Court of Appeals

SECOND CIRCUIT

RAYMOND MILLS,
Plaintiff-Appellant,

—and—

HARRY F. SIMMONS,
Plaintiff,

—against—

THE LONG ISLAND RAILROAD COMPANY, HAROLD J. PRYOR, THOMAS J. BUTLER, WALTER DAY, MERRILL J. PIERCE, MARTIN BURKE, JAMES MOON and SAL BARBUTO, constituting a majority of the Officers of the UNITED TRANSPORTATION UNION (T),
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

APPENDIX

JOSEPH P. NAPOLI
100 Church Street
New York, New York 10007
732-9000
Attorney for Appellant

GEORGE M. ONKEN
Jamaica Station
Jamaica, New York
Attorney for Appellee
Long Island Railroad Co.

THOMAS J. HIGGINS
200 So. Service Road
Roslyn Heights, New York
Attorney for Appellee
United Transportation Union

PAGINATION AS IN ORIGINAL COPY

INDEX

	PAGE
Docket Entries	1a
Order to Show Cause	3a
Verified Petition for Removal in Support of Motion	5a
Exhibit A, Summons Annexed to Petition for Removal	8a
Exhibit B, Verified Complaint, Annexed to Petition for Removal	10a
Exhibit C, Order to Show Cause, Annexed to Petition for Removal	19a
Affidavit of Raymond Mills	22a
Exhibit A, Article 42(a), Annexed to Foregoing Affidavit	27a
Exhibit B, Letter Agreement, Annexed to Foregoing Affidavit	28a
Exhibit C, Letter Agreement, Annexed to Foregoing Affidavit	30a
Exhibit D, Article 85, Annexed to Foregoing Affidavit	33a
Exhibit E, Article 8, Annexed to Foregoing Affidavit	34a
Exhibit F, Notice of Discipline, Annexed to Foregoing Affidavit	35a

PAGE

Exhibit G, Notice of Discipline, Annexed to Foregoing Affidavit 37a

Exhibit G-a(1), Notice of Formal Hearing, Annexed to Foregoing Affidavit 39a

Exhibit G-a(2), Notice of Formal Hearing, Annexed to Foregoing Affidavit 40a

Affidavit of Harry F. Simmons 41a

Exhibit H, Notice of Dismissal, Annexed to Foregoing Affidavit 45a

Exhibit I, Hearing Transcript, Annexed to Foregoing Affidavit 47a

Exhibit J, Letter, Annexed to Foregoing Affidavit 62a

Affidavit of Richard T. Haefeli 64a

Exhibit K, Summons and Verified Complaint, Annexed to Foregoing Affidavit 67a

Exhibit D, Notice of Cross-Motion and Affidavits in Support Thereof, Annexed to Petition for Removal 68a

Affidavit of Robert E. Peterson 70a

Affidavit of Lawrence W. Dixon 74a

Exhibit E, Affidavit of Harold J. Pryor in Oppotion to Plaintiffs' Order to Show Cause 79a

Affidavit of Raymond Mills in Support of Motion 84a

Exhibit A, Letter Dated June 3, 1974, Annexed to Foregoing Affidavit in Support of Motion 88a

PAGE

Exhibit B, Notice, Annexed to Foregoing Affidavit in Support of Motion 90a

Exhibit C, Letter, Annexed to Foregoing Affidavit in Support of Motion 91a

Affidavit of Richard T. Haefeli, in Support of Motion 92a

Transcript of Proceedings 95a

Memorandum Opinion and Order 116a

Judgment Appealed From 127a

Notice of Appeal 128a

TRANSCRIPT OF PROCEEDINGS

Witness for L.I.R.R.

Lawrence W. Dixon:

Direct 96a
Cross 99a
Redirect 105a
Recross 105a

Witness for Plaintiff

Raymond J. Mills:

Direct 108a
Cross 110a
Redirect 112a
Recross 113a

Docket Entries

DATE	PROCEEDINGS
6- 4-74	Petition for removal filed. (Sup. Ct/Cty of Suffolk)
6- 4-74	Bond for removal filed.
6-11-74	By JUDD, J.—Order to show cause dtd 6-11-74 for an order to remand action to SupCt/Suffolk, with T.R.O., ret 6-14-74 at 11A.M. without proof of service filed.
6-14-74	Affidavit of Thomas J. Higgins in opposition to request for an order to show cause filed.
6-14-74	Pltffs' memorandum of law filed.
6-14-74	Before JUDD, J.—Case called. Motion to remand to Supreme Ct argued. Decision reserved.
6-17-74	Memorandum of law by LIRR in opposition to pltffs' motions filed.
11- 1-74	By JUDD,J.—Order dated Oct. 30, 1974 filed that pltff's motion to remand be denied, that the deft's motion for summary judgment granted; that pltff Mills motion to hold the Long Island in contempt be denied; and that judgment dismissing the complaint be entered by the Clerk of Court. P.C. mailed to the attys.
11- 1-74	JUDGMENT dtd 11-1-74 dismissing complaint filed. (p/c mailed to attys).
11-22-74	Notice of Appeal filed. Copy sent to C of A. JN

Docket Entries

DATE	PROCEEDINGS
12- 2-74	Consent to Change Atty filed.
12-16-74	Deft's Memo of Law
12-19-74	Stenographer's Transcript of 6-14-74 filed
12-20-74	Above Record on Appeal certified and handed to Raymond Mills for delivery to the U. S. Court of Appeals.

Order to Show Cause

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

Upon the petition and exhibits requesting removal of the within action from the Supreme Court, State of New York, to the United States District Court, Eastern District of New York, and the annexed affidavits and exhibits of Raymond Mills sworn to on the 11th day of June, 1974 and the affidavit of Richard T. Haereli, Esq., duly sworn to on the 10th day of June, 1974, it is

ORDERED, that the Long Island Railroad Company and the United Transportation Union (T), show cause at this Court to be held at Courtroom 11, United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the 14th day of June, 1974, at 11:00 in the forenoon of the day or as soon thereafter as counsel can be heard for an Order remanding the above action to the Supreme Court, State of New York, County of Suffolk, or in the alternative an Order pursuant to Rule 65 of the Federal Rules of Civil Procedure for the relief requested by the plaintiffs' in an Order to Show Cause dated the 20th day of May, 1974 and signed by the Honorable William R. Geiler, Justice, Supreme Court, State of New York, with the additional relief that the defendant, Long Island Railroad Company, immediately reinstate the plaintiff, Raymond Mills, to his posi-

tion pending the outcome of the trial of the issue, and it is further

ORDERED, that pending a hearing and determination on this motion and if the within action is returned to the State Supreme Court, State of New York, pending a hearing and determination of plaintiffs' request for a preliminary injunction in said Court, or the further order of this court, the defendants hereby be and hereby are enjoined and restrained from proceeding with any further disciplinary action against the plaintiffs as a result of alleged violations of the letter agreements dated June 4th, 1973 and December 14th, 1973, and it is further

ORDERED, that personal service of this Order, the affidavits and exhibits, upon which it is based be made on or before the 11th day of June, 1974, by delivering a copy of same upon an officer or attorney for the Long Island Railroad Company, and by delivering a copy of same upon an officer or attorney for the United Transportation Union (T).

Service by Carol Wagner a person over the age of 21 years and not a party to the litigation is authorized to serve process.

Dated: Brooklyn, New York
June 11, 1974.
12 noon

ENTER:

ORRIN G. JUDD
United States District Judge

Verified Petition for Removal in Support of Motion

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

To the Judge of the United States District Court for the Eastern District of New York:

1. On or about May 21, 1974, an action was commenced against the petitioners in the Supreme Court of the State of New York, County of Suffolk, entitled Raymond Mills and Harry F. Simmons v. The Long Island Railroad Company, et al. A copy of the summons and verified complaint are attached hereto as Exhibits A and B respectively. On May 20, 1974, an order to show cause with a notice of hearing scheduled for May 30, 1974, was issued along with a restraining order, attached hereto as Exhibit C.

2. The time for answering or otherwise pleading to the above-described action has not yet expired.

3. On May 28, 1974, defendant, The Long Island Rail Road Company, made a cross-motion returnable on May 30, 1974, seeking to dismiss the complaint or in the alternative, for summary judgment. A copy of the notice of cross-motion and the affidavits annexed thereto are attached hereto as Exhibit D.

4. On May 30, 1974, defendant, Harold J. Pryor, submitted an affidavit in response to plaintiffs' order to show cause. Said affidavit is annexed hereto as Exhibit E.

5. The hearing upon plaintiffs' order to show cause scheduled for May 30, 1974, was postponed until June 13, 1974, by order of the Supreme Court, State of New York, County of Suffolk.

6. Defendant, The Long Island Rail Road Company, is an employer in an industry affecting commerce within the meaning of the Railway Labor Act, 45 U.S.C. §151 et seq.

7. Defendants, Harold J. Pryor, Thomas J. Butler, Walter Day, Merrill J. Pierce, Martin Burke and Sal Barbuto are employees in an industry affecting commerce within the meaning of the Railway Labor Act, 45 U.S.C. §151 et seq.

8. The above-described action seeks, inter alia, denial of, and/or interference with rights arising under the Railway Labor Act, 45 U.S.C. §151 et seq.

9. The above-described action is one of which this Court has original jurisdiction, in that it arises under the Constitution and laws of the United States, in this and other respects provided for by 28 U.S.C. §1441.

10. The above-described action alleges a breach of a collective bargaining agreement which is an action over which this Court has original jurisdiction pursuant to the Railway Labor Act, 45 U.S.C. §151 et seq.

11. The petitioners herewith file a bond with good and sufficient surety conditioned, as provided by 28 U.S.C. §1446(d), that they will pay all costs and disbursements incurred by reason of the removal proceedings hereby

brought should it be determined that this action is not removable or is improperly removed.

WHEREFORE, for the above reasons, among others, the petitioners ask that the above-described action pending against them in the Supreme Court of the State of New York, County of Suffolk, be removed therefrom to this Court.

GEORGE M. ONKEN
Attorney for Petitioner
The Long Island Rail Road Company
Jamaica Station
Jamaica, New York 11435

THOMAS J. HIGGINS
Attorney for Petitioners
Harold J. Pryor, Thomas J. Butler, Walter Day, Merrill J. Pierce, Martin Burke, James Moon and Sal Barbuto, as Officers of the United Transportation Union
200 S. Service Road
Roslyn Heights, New York

(Verified by Harold J. Pryor and Margaret I. Kehoe, June 3, 1974.)

EXHIBIT A, SUMMONS, ANNEXED TO PETITION FOR REMOVAL

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF SUFFOLK

Index No. .....

[SAME TITLE]

SUMMONS

Plaintiffs designates Suffolk County as the place of trial.

The basis of the venue is Plaintiff's residence (Raymond Mills).

Plaintiff resides at (Raymond Mills), 22 Lori Way, Hauppauge, New York, County of Suffolk.

To the above named Defendant

YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney(s) within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Exhibit A, Summons

Dated, May 14th, 1974.

MEYER & WEXLER, Esqs.
Attorney(s) for Plaintiff
Office and Post Office Address
28 Manor Road
Smithtown, New York 11787
516—265-4500

By Hand
RECEIVED
LAW DEPT.
MAY 21 1974
The Long Island
Rail Road Company
10:35 A.M.

EXHIBIT B, VERIFIED COMPLAINT, ANNEXED TO PETITION FOR REMOVAL

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF SUFFOLK

[SAME TITLE]

Plaintiffs complaining of the defendants' by their attorney, MEYER & WEXLER, ESQS., respectfully alleges:

First: That the plaintiff, RAYMOND MILLS resides at 22 Lori Way, Hauppauge, County of Suffolk, State of New York.

Second: That the plaintiff, HARRY F. SIMMONS, resides at 180 St. Nicholas Avenue, County of New York, State of New York.

Third: That upon information and belief at all times hereinafter mentioned that the defendant, LONG ISLAND RAILROAD COMPANY is a wholly owned subsidiary corporation of the Metropolitan Transportation Authority, having its principal office at Jamaica, County of Queens, State of New York.

Fourth: That pursuant to Title 11 Public Authorities Law of the State of New York, the Metropolitan Transportation Authority is a political subdivision and agency of the State of New York.

Exhibit B, Verified Complaint

Fifth: That pursuant to Section 1266 (b) of the Public Authority Law of the State of New York, the LONG ISLAND RAILROAD COMPANY being a subsidiary corporation of the Metropolitan Transportation Authority is subject to the restrictions and limitations to which the Metropolitan Transportation Authority may be subject.

Sixth: That Harold J. Pryor, Thomas J. Butler, Walter Day, Merrill J. Pierce, Martin Burke, James Moon, Sal Barbuto and Raymond Mills constitute the officers of the UNITED TRANSPORTATION UNION (T) and said union is the duly constituted bargaining agent for the plaintiffs with THE LONG ISLAND RAILROAD COMPANY and the General Committee of Adjustment is the unit which represents said union in its contract of negotiations with the defendant, LONG ISLAND RAILROAD COMPANY and that its principal place of business is in the County of Nassau, State of New York.

Seventh: That plaintiff, RAYMOND MILLS, has been employed by the defendant, LONG ISLAND RAILROAD COMPANY since 1954 and has been Local Chairman (Passenger) Local 645, UNITED TRANSPORTATION UNION (T) since 1970, and since said date has been an officer of said union and a member of said union's General Committee of Adjustment.

Eighth: That the plaintiff, HARRY F. SIMMONS, has been employed by the defendant, LONG ISLAND RAILROAD COMPANY since 1969 and has been a member of the UNITED TRANSPORTATION UNION (T) since said date.

Ninth: That on the 17th day of February, 1972, the UNITED TRANSPORTATION UNION (T) and THE LONG ISLAND RAILROAD COMPANY entered into an agreement of employ-

ment covering members of said union who are employed by THE LONG ISLAND RAILROAD COMPANY.

Tenth: That both plaintiffs being members of said union and employees of THE LONG ISLAND RAILROAD COMPANY are covered by said agreement.

Eleventh: That Article 42(a) of said agreement states as follows: "employees shall not be suspended or dismissed from service without a fair and impartial trial."

Twelfth: Subsequent to the date of the aforementioned agreement and on or about the 4th day of June, 1973, an agrement was entered into between Walter L. Schlager, President of THE LONG ISLAND RAILROAD COMPANY and Harold J. Pryor, General Chairman, UNITED TRANSPORTATION UNION (T) which said agreement modified the aforementioned Article 42(a) to the extent that an employee covered by the agreement dated February 17th, 1972, could be suspended and/or dismissed without a trial if said employee accumulated from three to five run failures within a 12 month period.

Thirteenth: That said agreement of June 4th, 1973, was further modified by a letter agreement dated December 14th, 1973, between the same parties to the extent that an employee could not be dismissed without a formal hearing if said employee so desired a formal hearing and notified THE LONG ISLAND RAILROAD COMPANY within 10 days of the date of his dismissal, but said letter agreement in no way modified the June 4, 1973 letter agreement regarding suspensions.

Exhibit B, Verified Complaint

Fourteenth: That pursuant to Article 85 of the Constitution of the UNITED TRANSPORTATION UNION (T) the General Committee of Adjustment of the defendant union has the authority to "make and interpret agreements with representatives of transportation companies covering rates of pay, rules, or working conditions . . ."

Fifteenth: That upon information and belief said General Committee of Adjustment, has never held a meeting at which the aforesaid letter agreements were approved or adapted.

Sixteenth: That the aforesaid letter agreements have never been approved by a vote of the membership of the UNITED TRANSPORTATION UNION (T) which vote is required by Article 8 of the agreement of employment between UNITED TRANSPORTATION UNION (T) and THE LONG ISLAND RAILROAD COMPANY dated February 17th, 1972.

Seventeenth: That prior to the aforesaid letter agreements any employee of the UNITED TRANSPORTATION UNION (T) upon whom discipline was imposed as a result of a run failure was accorded a trial prior to the imposition of any disciplinary action in the nature of a suspension or dismissal.

Eighteenth: That at the present time the plaintiff, RAYMOND MILLS, has been notified in writing that as a result of run failures he is subject to both a 15 day and 30 day suspension.

Nineteenth: That the plaintiff, HARRY F. SIMMONS, did incur a suspension for a period of 15 days during the month

of February, 1974, and at no time was the plaintiff, HARRY F. SIMMONS afforded the opportunity of a fair and impartial trial with respect to said suspension.

Twentieth: That the plaintiff, HARRY F. SIMMONS was notified in writing that he was subject to suspension for a period of 30 days as a result of a run failure occurring on January 12th, 1974.

Twenty-first: That the plaintiff, HARRY F. SIMMONS, was dismissed from the employ of THE LONG ISLAND RAILROAD COMPANY on April 2nd, 1974, and that the plaintiff, HARRY F. SIMMONS was not afforded a fair and impartial trial prior to said dismissal.

Twenty-second: That the plaintiff, HARRY F. SIMMONS, was afforded a trial subsequent to his dismissal on April 2nd, 1974, said trial occurring on April 19th, 1974, and that at said trial a W. M. Glennon, and employee of THE LONG ISLAND RAILROAD COMPANY acted as both hearing officer and prosecutor, and that subsequent thereto the dismissal of the plaintiff, HARRY F. SIMMONS, was affirmed by a J. C. Valder, Superintendent, Transportation, LONG ISLAND RAILROAD COMPANY.

Twenty-third: That the plaintiff, HARRY F. SIMMONS, has not been employed by THE LONG ISLAND RAILROAD COMPANY since April 2nd, 1974.

Twenty-fourth: That the letter agreements of June 4th, 1973 and December 14th, 1973, are unenforceable and in violation of the plaintiffs contractual rights as set forth in the agreement of employment dated February 17th, 1972,

in that said letter agreements were never submitted to nor ratified by the membership of the UNITED TRANSPORTATION UNION (T).

Twenty-fifth: That the letter agreements of June 4th, 1973 and December 14th, 1973, are unenforceable in that said agreements were never approved at a meeting of the General Committee of Adjustment, UNITED TRANSPORTATION UNION (T) as required by Article 85 Constitution of said union.

Twenty-sixth: That said agreements are unenforceable and invalid and violate the plaintiffs' constitutional rights as set forth in the Fourteenth Amendment of the United States Constitution as well as Article 1, Section 6 of the New York State constitution in that they deny the plaintiffs their employment without a fair and impartial trial.

Twenty-seventh: That the letter agreements of June 4th, 1973 and December 14th, 1973 are unenforceable and in violation of Article 1, Section 1, the Constitution of the State of New York in that they deny the plaintiff the right to a fair and impartial trial before being suspended or dismissed which said right is established in the agreement of employment dated February 17th, 1972, Article 42(a), and that the denial of said right was not done by the law of the land or the judgment of the plaintiffs' peers.

Twenty-eighth: That the plaintiff, HARRY F. SIMMONS was denied his constitutional right of due process at the hearing held on April 19th, 1974, in that the same person not only acted as hearing officer, but as prosecutor of the charges against the plaintiff, HARRY F. SIMMONS.

Exhibit B, Verified Complaint

Twenty-ninth: That by reason of the foregoing the plaintiffs have been and are continuing to suffer irreparable harm and injury as a result of the aforementioned violation of their contract and constitutional rights and in addition the plaintiff, HARRY F. SIMMONS, has been damaged by the loss of pay during the period of suspension as well as a loss of pay and other benefits since the date of his dismissal.

Thirtieth: That the plaintiffs' have no adequate remedy at law.

Thirty-first: By reason of the foregoing, a judicial declaration and determination is necessary and desireable in order to resolve the serious contractual and constitutional issues of the plaintiffs rights.

As and for a Second Separate and Distinct Cause of Action

Thirty-second: The plaintiffs repeat, reiterate and reallege each and every allegation contained in paragraphs numbered "First" through "Thirty-first" with the same force and effect as if set forth at length herein.

Thirty-third: That the plaintiff, HARRY F. SIMMONS, as a result of the unlawful and unconstitutional actions of the defendant has been deprived of his right to work for two weeks during the month of February, 1974, and has continuously been deprived of his right to work from the 2nd day of April, 1974.

Thirty-fourth: That the plaintiff, RAYMOND MILLS, as a result of the unlawful and unconstitutional actions of the

defendant, has been threatened with and is presently subject to suspension from his employment for a total period of 45 days.

Thirty-fifth: That the continued enforcement of the aforementioned letter agreements by the defendants will cause these plaintiffs to be deprived of their contractual and constitutional rights.

WHEREFORE, plaintiffs demand judgment against the defendants as follows:

1. That the letter agreement of June 4th, 1973 and the letter agreement of December 14th, 1973, be declared unlawful, invalid, void, unenforceable and in violation of the plaintiffs constitutional rights.

2. Granting the plaintiffs a permanent injunction ordering the defendants, their agents, servants, and/or employees and all persons in active concert with them from enforcing the letter agreements dated June 4th, 1973, and December 14th, 1973.

3. Reinstate the plaintiff, HARRY F. SIMMONS, to his position as an employee of THE LONG ISLAND RAILROAD COMPANY and grant to said plaintiff all the back pay and other benefits denied him as a result of the enforcement of the letter agreements of June 4th, 1973 and December 14th, 1973.

4. Order the defendant, LONG ISLAND RAILROAD COMPANY, to remove from the personal files of each of the plaintiffs any and all references presently contained in said files with

respect to the violation of the aforementioned letter agreements of June 4th, 1973 and December 14th, 1973.

5. Grant such other and further relief as to this Court may seem just and proper.

MEYER & WEXLER, ESQS.
Attorneys for Plaintiffs
Office & P. O. Address
28 Manor Road
Smithtown, New York 11787
516-265-4500

EXHIBIT C, ORDER TO SHOW CAUSE, ANNEXED TO PETITION FOR REMOVAL

At a Special Term Part I of the Supreme Court of the State of New York, held in and for the County of Suffolk, at the Courthouse thereof, Griffing Avenue, Riverhead, New York, on the 20 day of May, 1974.

Present:

HON. WILLIAM R. GEILER,

Justice.

Index No.: 74-8111

[SAME TITLE]

Upon the annexed affidavits of RAYMOND MILLS, duly sworn to on the 17 day of May, 1974, HARRY F. SIMMONS, duly sworn to on the 17 day of May, 1974, and RICHARD T. HAEFELI, Esq., duly sworn to on the 17 day of May, 1974, and upon the Summons and Verified Complaint herein,

LET, THE LONG ISLAND RAILROAD COMPANY, and the UNITED TRANSPORTATION UNION (T), show cause at a Special Term Part I of this Court to be held at the Courthouse thereof, Griffing Avenue, Riverhead, New York, on the 30th day of May, 1974, at 10:00 in the forenoon of that day or as soon thereafter as counsel can be heard why a preliminary

injunction pursuant to Section 6301 of the CPLR should not be granted pending the determination of this action for the following:

1. Enjoining THE LONG ISLAND RAILROAD COMPANY and the UNITED TRANSPORTATION UNION (T) from enforcing or taking any action with respect to the letter agreements dated June 4th, 1973 and December 14th, 1973, which said letter agreements provide for the suspension and/or dismissal of employees of THE LONG ISLAND RAILROAD COMPANY who are members of the UNITED TRANSPORTATION UNION (T) without a trial.

2. Enjoining THE LONG ISLAND RAILROAD COMPANY from proceeding with any further action against the plaintiffs' herein as a result of alleged violation of the aforementioned letter agreements.

3. Ordering THE LONG ISLAND RAILROAD COMPANY to immediately reinstate the plaintiff, HARRY F. SIMMONS, to his position pending the outcome of a trial of the issues.

SUFFICIENT CAUSE APPEARING THEREFORE, IT IS

ORDERED, that pending a hearing on this motion the defendants hereby be and hereby are enjoined and restrained from proceeding with any disciplinary action presently pending against the plaintiffs as a result of alleged violations of the aforementioned letter agreements of June 4th, 1973 and December 14th, 1973, and it is further

ORDERED, that personal service of this Order, the papers upon which it is based and the Summons and Verified Com-

Exhibit C, Order to Show Cause

plaint be made on or before the 2nd day of May, 1974, by delivering a copy of this Order, and the papers upon which it is based and the Summons and Complaint upon an officer or attorney for THE LONG ISLAND RAILROAD COMPANY and that service upon an officer of the UNITED TRANSPORTATION UNION (T) personally be sufficient to constitute service upon the UNITED TRANSPORTATION UNION (T).

ENTER:

WILLAM R. GEILER
J.S.C.

Affidavit of Raymond Mills

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF SUFFOLK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF SUFFOLK, *ss.*:

RAYMOND MILLS, being duly sworn, deposes and says:

1. That your deponent has been employed by The Long Island Railroad Company since 1954 and has been Local Chairman (Passenger) Local 645, United Transportation Union (T) since 1970.

2. That your deponent resides at 22 Lori Way, Hauppauge, New York.

3. That on the 17th day of February, 1972, the United Transportation Union (T) and The Long Island Railroad Company entered into an agreement of employment covering members of said Union who were employed by The Long Island Railroad Company. That your deponent being a member of said union is covered by said agreement.

4. That Harold J. Pryor, Thomas J. Butler, Walter Day, Merrill J. Pierce, Martin Burke, James Moon, Sal Barbuto and your deponent constitute the officers of the United Transportation Union (T) as well as th membership of the

General Committee of Adjustment of the United Transportation Union (T).

5. That Article 42(a) of said agreement states as follows: "Employees shall not be suspended or dismissed from service without a fair and impartial trial." (Annexed hereto, made a part hereof and marked Exhibit "A" is a true and exact copy of said Article 42(a).)

6. That subsequent to the date of said agreement and on or about the 4th day of June, 1973, an agreement was entered into between Walter L. Schlager, Jr., President of The Long Island Railroad Company, and Harold J. Pryor, General Chairman, United Transportation Union (T) which said agreement modified the aforementioned Article 42(a) to the extent that an employee covered by said agreement could be suspended and/or dismissed without a trial if said employee accumulated from three to five "run failures" within a twelve (12) month period. (Annexed hereto, made a part hereof and marked Exhibit "B" is a true and exact copy of said letter agreement.)

7. That said agreement was further modified by a letter agreement dated December 14th, 1973, between Walter J. Schlager, Jr. President, President, Long Island Railroad Company and Harold J. Pryor, General Chairman, United Transportation Union (T) to the extent that an employee could not be dismissed without a formal hearing if said employee so desired a formal hearing and notified The Long Island Railroad Company within ten (10) days of the date the discipline was imposed. That said agreement

of December 14th, 1973, in no way effected or modified the agreement of June 4th, 1973, which provided for a suspension without trial. (Annexed hereto, made a part hereof and marked Exhibit "C" is a true and exact copy of said letter agreement.)

8. That pursuant to Article 85 of the Constitution of the United Transportation Union the General Committee of Adjustment has the authority to: "Make and interpret agreements with representatives of transportation companies covering rates of pay, rules or working conditions . . . " (Annexed hereto, made a part hereof and marked Exhibit "D" is a true and exact copy of said part of Article 85.)

9. That your deponent is a member of said General Committee of Adjustments and to your deponent's own knowledge there was no meeting held by said Committee at which or whereat the two aforementioned letter agreements dated June and December were approved by said Committee.

10. That your deponent further knows of his own knowledge that said letter agreement aforesaid has never been approved by a vote of the membership of said union.

11. That Article 8 of the agreement between the United Transportation Union (T) and The Long Island Railroad Company of February 17th, 1972, provides for said agreement to be ratified by the membership of said union. (Annexed hereto, made a part hereof, and marked Exhibit "E" is a true and exact copy of said Article 8.)

12. That your deponent further knows of his own knowledge that prior to the aforesaid letter agreement, any employee of the union who was subject to discipline for "run failures" was accorded a trial before disciplinary action of a suspension or dismissal was imposed.

13. That your deponent was advised in writing on April 11, 1974, that your deponent pursuant to the aforesaid letter agreement of June was subject to a 15 day suspension for run failure. (Annexed hereto, made a part hereof and marked Exhibit "F" is a true and exact copy of said notice of discipline.)

14. That your deponent was further advised in writing on April 16th, 1974, based upon the aforesaid letter agreement of June, that your deponent was subject to a suspension of 30 days for run failure. (Annexed hereto, made a part hereof, and marked Exhibit "G" is a true and exact copy of said notice of discipline.)

15. That subsequent thereto and after demand by your deponent, your deponent was advised by The Long Island Railroad Company that a formal hearing would be held regarding the two aforementioned run failures before the American Arbitration Association, on May 24th, 1974. Since said formal hearing before the American Arbitration Association is not a trial it does not comply with Article 42(a) of the contract on due process. (Annexed hereto made a part hereof and marked Exhibit "G-a" is a true and exact copy of Notice of Formal Hearing dated April 24th, 1974.)

16. Your deponent respectfully submits to this Court that the two aforementioned letter agreements violate your deponent's rights in the following manner:

a) Since the original contract dated February 17th, 1972, was subject to a ratification by the membership of the union, any modification and change to a substantial section of said contract was also subject to the ratification of the union membership.

b) Since said letter agreements were never approved at a meeting of the General Committee of Adjustments they are not binding upon your deponent or other members of the Union.

c) That said letter agreements violate your deponent's constitutional rights as provided for in the Fourteenth Amendment of the United States Constitution, as well as Article 1, Section 6 and Article 1, Section 1 of the New York State Constitution.

WHEREFORE, your deponent respectfully requests that the within application be in all respects granted.

RAYMOND MILLS

(Sworn to by Raymond Mills on May 15, 1974.)

EXHIBIT A, ARTICLE 42(a), ANNEXED TO FOREGOING AFFIDAVIT

endar days from the date of the occurrence on which the claim is based.

(b) If claims are not made within the time limit specified in the foregoing paragraph (a), they shall not be entertained or allowed.

(c) When claims for compensation alleged to be due have been presented in accordance with the foregoing paragraph (a), are not allowed, the employe shall be notified to that effect, in writing, within fifteen (15) calendar days from the date the claims were presented. When not so notified within the fifteen (15) calendar days, the claim shall be allowed.

(d) A claim for compensation denied in accordance with the foregoing paragraph (c), shall be considered invalid unless it is listed for conference by the Union with the highest officer designated by the Rail Road to handle claims within thirty (30) calendar days after date on which the claim is initially denied.

(e) When a claim for compensation, handled in accordance with paragraph (d) of this Rule is allowed, the Union shall be advised, in writing, the amounts involved and the payrolls on which the payment will be made.

(f) When an employe's pay is short one day or more, adjustment will be made upon request.

(g) Employes will be furnished receipts for penalty time card claims and will acknowledge receipt of written denial of such claims.

(h) Decision by the highest officer designated by the Rail Road to handle claims shall be final and binding, unless within three (3) months from the date of said officer's decision proceedings for the final disposition of the claim are instituted by the employe or his duly authorized representative before the National Railroad Adjustment Board or a local board of adjustment that has been agreed to by the parties hereto. It is understood, however, that the parties may, by agreement in any particular case, extend the three (3) months' period herein referred to.

ARTICLE 42

DISCIPLINE

(a) Employes shall not be suspended or dismissed from service without a fair and impartial trial.

(b) When a major offense has been committed, an employe considered by the Rail Road to be guilty thereof may be held out of service pending trial and decision.

(c) An employe who is required to make a formal statement prior to the trial in connection with any matter which may eventuate in the application of discipline to any employe, may if he desires to be represented, be accompanied by a representative of the United Transportation Union.

(d) In the event that the individual involved indicates that he does not desire representation, then the Union's representative will take no part in the proceedings except to observe that there is no violation of the Schedule of Working Conditions or Trainmen.

(e) A copy of all statements taken in connection with disciplinary matters shall be furnished to the General Chairman of the United Transportation Union. The employe will be entitled to a copy of his own statement if signed by him.

(f) An employe who is accused of an offense and who is directed to report for a trial thereof, shall be given reasonable advance notice in writing of the exact charge on which he is to be tried and the time and place of the trial.

(g) If he desires to be represented at such trial, he may be accompanied by a representative of the United Transportation Union or a representative whom he has authorized, in writing, to represent him. The accused employe or his representative shall be permitted to question witnesses who

estimony is presented at the trial insofar as the f the accused employe are concerned. Such em ake his own arrangements for the presence o epresentative and no expense incident thereto sha y the Rail Road.

(h) A true copy of the trial record shall be gi ccused employe and the General Chairman of ransportation Union.

(i) If discipline is to be imposed following th mploye to be disciplined shall be given wri ereof by the Superintendent - Transportation a 10) calendar days prior to the date on which th s to become effective, but not later than five (ays following the trial, except that in cases in ssal, such dismissal may be made effective fter decision without advance notice. If the d e applied is suspension, the time the employe is ervice prior to the serving of the notice of disc e applied against the period of suspension.

(j) If the Superintendent's decision, which s ming and rendered not later than five (5) ca llowing the trial, is unsatisfactory to the empl peal his case to an impartial arbitrator appointe ce with the provisions of this Article. Notific mploye's desire to make such appeal must be fil ith the Superintendent - Personnel Managemen 0) calendar days following the date the empl itten notice of the Superintendent's decision.

(k) 1. Upon notification of an employe's desi he Superintendent's decision, the Carrier shal peal for a hearing before an arbitrator appo merican Arbitration Association.

2. Appeals will be held at the offices of rbitration Association on the second and four ach calendar month, as required.

3. The Carrier will, within two (2) busine e receipt of the notice, notify the employe's r f the earliest practicable date when the appeal n no event will an appeal be docketed for hear he second hearing date following the receipt of t otice.

4. Appeals shall be conducted in accord les of the American Arbitration Association.

5. The arbitrator shall provide a written ndings and award to the parties within ten ays after the close of the hearing.

6. The arbitrator shall be paid reasonab ion for his services, to be borne equally by the

(l) When an employe is held out of service ith an offense and is thereafter exonerated, th e stricken from his record, he shall be reinsta with his seniority unimpaired, and he will be co the earnings he would have received had he not rom service.

ARTICLE 43

PLACEMENT OF DISABLED TRAIN

Nothing in this Agreement shall preclude the ny service of a disabled trainman to any pos rakemen or collector, or the removal of the tility brakemen or collector position to permit t disabled trainman when agreed to by the Sup the General Chairman of the United Transport In the application of the foregoing, seniorit

EXHIBIT B, LETTER AGREEMENT, ANNEXED TO FOREGOING AFFIDAVIT

(Letterhead of The Long Island Rail Road,
Jamaica Station, Jamaica, New York 11435)

June 4, 1973

Mr. H. J. Pryor, General Chairman
United Transportation Union
647 Franklin Avenue
Garden City, New York 11530

Dear Mr. Pryor:

This has reference to the several conversations had between you and Superintendent–Transportation J. C. Valder regarding a proposed change in the procedure for handling discipline in connection with run failures.

It is agreed that such discipline will be assessed on the following schedule:

1. First run failure, "talk session" with the appropriate Assistant Superintendent or his representative,
2. Second run failure, record assessed with a "reprimand."
3. Third run failure, an actual fifteen (15) days' suspension.
4. Fourth run failure, an actual thirty (30) days' suspension.

(It is understood that repeated run failures can result in the successive imposition of the discipline specified in

either steps 1, 2, 3, or 4, subject only to the restrictions of the twelve-month period referred to herein below.)

5. Five (5) run failures within any twelve-month period will result in the employee's dismissal.

No formal investigation (or trial) will be held on any of the aforestated five (5) steps. However, if the employe desires, he may appeal the discipline imposed in steps 3, 4, and 5 in accordance with the provisions of Article 42(k) of the Working Agreement provided he notifies the Superintendent–Personnel Management within ten (10) days of the date the assessed discipline becomes effective.

Any run failure more than twelve (12) months old will not be counted and will be deleted from the employe's record.

If the foregoing correctly expresses your understanding of the matter, please affix your signature at the place provided below.

Very truly yours,

/s/ W. L. Schlager, Jr.
W. L. Schlager, Jr.
President

I Concur:

/s/ Harold J. Pryor
General Chairman
United Transportation Union

HNC/ct

EXHIBIT C, LETTER AGREEMENT, ANNEXED TO FOREGOING AFFIDAVIT

(Letterhead of The Long Island Rail Road,
Jamaica Station, Jamaica, New York 11435)

December 14, 1973

Mr. H. J. Pryor, General Chairman
United Transportation Union
647 Franklin Avenue
Garden City, New York 11530

Dear Mr. Pryor:

This is further in connection with the several conversations you had with Mr. R. E. Peterson, Superintendent-Personnel Management, seeking clarification of the "appeal" provisions of the June 4, 1973 Letter Agreement covering "run failures."

It was agreed that before the involved employe can be permanently discharged, as provided in Step 5, he may be accorded a formal hearing, if he desires, and so notifies the Superintendent within ten (10) days of the date he is notified of the discipline.

This provision will apply likewise to the two cases presently being progressed to the American Arbitration Association; namely, J. T. Cannon, Case RF 341-73 and B. Jones, Case RF 375-73.

It is further understood that, except for the modification listed herein above, the June 4, 1973 Agreement remains in full force and effect.

Exhibit C, Letter Agreement

If the foregoing correctly expresses your understanding of the matter, please affix your signature at the place provided below returning the original and one signed copy for our files.

Very truly yours,

/s/ W. L. Schlager, Jr.
W. L. Schlager, Jr.
President

I Concur:

/s/ Harold J. Pryor
H. J. Pryor, General Chairman

HNC/ct

EXHIBIT D, ARTICLE 85, ANNEXED TO FOREGOING AFFIDAVIT

(See opposite) ☞

tive date of such change. Such proposition must be approved by a majority vote of the members of the General Committee before being made effective.

All reasonable and proper expenses of a General Committee, officer, or member thereof when in the service of a General Committee shall be allowed as expense of the General Committee. An itemized statement of expenses incurred, with receipts for all items in excess of $5.00, and any amount due for services rendered shall be submitted to the Chairman of the General Committee. When such statements are approved they shall be submitted to the General Secretary and Treasurer for prompt payment. A copy of all such statements shall be furnished to the Secretary of the General Committee.

Where not otherwise provided for the General Chairman may rent office space, purchase office equipment, and employ such clerical assistance as necessary, when authorized to do so by a majority vote of the General Committee in session or by mail vote between sessions.

ARTICLE 85
DUTIES OF GENERAL COMMITTEES OF ADJUSTMENT

General Committees of Adjustment shall have authority to make and interpret agreements with representatives of transportation companies covering rates of pay, rules, or working conditions—all in accordance with the provisions of this Constitution.

General Committees shall investigate all m
ters properly submitted to them and shall h
the authority to alter, amend, add to, or str
out any part, or all, of any matter submitted
them.

In the event a matter cannot be satisfactor
adjusted, the General Chairman may requ
the assistance of the International Preside
Upon receipt of such request, the Internatio
President or his representative shall meet w
the General Chairman and renew efforts to
tain a satisfactory adjustment of the matt
He, or his representative, shall be vested w
the same authority held by the General Co
mittee to progress the matter to a conclusio
In the event the International President
his representative and the Committee are
able to reach a satisfactory adjustment of t
matter, the International President may or
a strike on all or any portion of the compa
involved. Such strike action must be authoriz
by a two-thirds vote of the members of the G
eral Committee. Such vote may be taken
wire, mail, or personal contact with written c
firmation as the General Chairman may dir
Between sessions of the General Committ
of Adjustment, the Chairman of such Comm
tee shall exercise all rights, privileges, a
authority vested in the General Committee,
cept as otherwise directed by the General Co
mittee while in session.

A General Committee may elect from
members a sub-committee and vest such co

who meet the qualifications are:

Length of Service	Vacation Allowance
1 year but less than 5 years	2 weeks
5 years but less than 15 years	3 weeks
15 years but less than 20 years	4 weeks
20 years and over	5 weeks

ARTICLE 5. Railroad-Union Plan of Benefits

a) During the term of this Agreement, the Rail Road and the Union shall continue the health, disability, sick leave, retirement, life insurance and other welfare benefits as the Rail Road and the Union have incorporated in the Plan of Benefits attached hereto as Appendix "B". The provisions of former agreements incorporated in Appendix "B" are applicable only with respect to, and to the extent of, the health and welfare benefits contained therein.

b) Effective the date this Agreement is signed, the Sick Leave Agreement included in the Plan of Benefits (Appendix "B") shall be amended as follows:

1) The present language of Section 4(a) shall be changed to read:

"Should an employe's scheduled vacation commence during a leave of absence for illness, the vacation shall be cancelled and rescheduled for a later date in accordance with the requirements of the service. The vacation shall be rescheduled by the Rail Road so as to be completed no later than December 31. However, if there is not sufficient time remaining within which to reschedule such vacation prior to December 31, the vacation will be carried over to the next succeeding year, with the employe to be granted actual time off and not payment in lieu of the vacation."

2) The present language of Section 5(c) shall be changed to provide notification of at least three (3) hours instead of two (2) hours as at present.

ARTICLE 6. No Strike Clause

During the term of this Agreement, the Union agrees there shall be no strike, sit-down, slowdown, stoppage of work, or willful slowdowns, in whole or in part, from the full, faithful and proper performance of the duties of the employes.

ARTICLE 7. Moratorium Clause

There shall be a moratorium in effect on all Section 6 Notices by either the Union or the Rail Road until December 31, 1973.

ARTICLE 8. Term of Agreement

The wages and fringe benefits provided for herein are subject to approval by the Railroad and shall become effective only when and to the extent approved by the Board.

Appendix "A" hereto will be implemented concurrently with the introduction of a new timetable known as Timetable No. 1, which shall be put into operation not later than sixty (60) days following the signing of this Agreement.

This Agreement supersedes all previous agreements, understandings, and practices established, and is in full, final and complete settlement of all matters whatsoever contained in the Union's Section 6 Notice dated October 27, 1970, and all communications with respect and relating thereto, both oral and written, and shall continue in effect to and including December 31, 1973, and thereafter until changed or modified in accordance with the provisions of the Railway Labor Act, as amended.

This Agreement is subject to ratification by membership of the Union.

IN WITNESS WHEREOF, the parties hereto ha
hands and seals as of the day and year first wr

FOR THE UNITED TRANSPORTATION UNI

/s/ Harold J. Pryor

General Chairman

/s/ James J. Walsh

Vice Chairman

/s/ C. J. Quinn

Secretary-General Committee

/s/ Merrill J. Pierce

Local Chairman-Passenger

/s/ R. J. Mills

Local Chairman-Passenger

/s/ John J. Manor

Local Chairman-Freight

FOR THE LONG ISLAND RAIL ROAD CO

/s/ Walter L. Schlager, Jr.

President

Dated: February 17, 1972

EXHIBIT F, NOTICE OF DISCIPLINE, ANNEXED TO FOREGOING AFFIDAVIT

THE LONG ISLAND RAIL ROAD

NOTICE OF DISCIPLINE FOR RUN FAILURE

File No. RF 170-74

Name R. J. MILLS #13140

Date APRIL 9, 1974

Occupation PASSENGER CONDUCTOR

Under the agreement reached between the United Transportation Union and the Long Island Rail Road, effective Monday, June 25, 1973, the following procedures for handling discipline in connection with run failures are in effect.

Discipline will be assessed on the following schedules:

(1) First run failure, "Talk Session" with the appropriate Assistant Superintendent or his representative.

(2) Second run failure, record assessed with a "Reprimand".

(3) Third run failure, an actual "Fifteen (15) days Suspension".

(4) Fourth run failure, an actual "Thirty (30) days Suspension".

It is understood that repeated run failures can result in a successive imposition of the discipline specified in either

steps 1, 2, 3, or 4, subject only to the restrictions of the twelve month period referred to herein below.

(5) Five run failures within any twelve (12) month period will result in the employes "Dismissal".

You may appeal the discipline imposed in steps 3, 4 and 5 in accordance with the provisions of Article 42 (k) of the working agreement provided you notify the Superintendent–Personnel Management within ten (10) days of the date the assessed discipline becomes effective.

Outline of Offense

FAILING TO COVER YOUR ASSIGNMENT, RUN #22, ON MONDAY, APRIL 8, 1974.

Number of Run Failures to Date THREE (3)

Discipline Imposed FIFTEEN (15) DAYS SUSPENSION

/S/ J. C. VALDER
Superintendent–Transportation

/S/ R. J. MILLS

Date 4/11/74

EXHIBIT G, NOTICE OF DISCIPLINE, ANNEXED TO FOREGOING AFFIDAVIT

THE LONG ISLAND RAIL ROAD

NOTICE OF DISCIPLINE FOR RUN FAILURE

File No. RF 174-74

Name R. J. MILLS #13140

Date APRIL 15, 1974

Occupation PASSENGER BRAKEMAN

Under the agreement reached between the United Transportation Union and the Long Island Rail Road, effective Monday, June 25, 1973, the following procedures for handling discipline in connection with run failures are in effect.

Discipline will be assessed on the folowing schedules:

(1) First run failure, "Talk Session" with the appropriate Assistant Superintendent or his representative.

(2) Second run failure, record assessed with a "Reprimand".

(3) Third run failure, an actual "Fifteen (15) days Suspension".

(4) Fourth run failure, an actual "Thirty (30) days Suspension".

It is understood that repeated run failures can result in a successive imposition of the discipline specified in either

steps 1, 2, 3, or 4, subject only to the restrictions of the twelve month period referred to herein below.

(5) Five run failures within any twelve (12) month period will result in the employes "Dismissal".

You may appeal the discipline imposed in steps 3, 4 and 5 in accordance with the provisions of Article 42 (k) of the working agreement provided you notify the Superintendent–Personnel Management within ten (10) days of the date the assessed discipline becomes effective.

Outline of Offense

FAILING TO COVER YOUR ASSIGNMENT, RUN #9, ON SUNDAY, APRIL 14, 1974.

Number of Run Failures to Date FOUR (4)

Discipline Imposed THIRTY (30) DAYS SUSPENSION

R. J. Mills requests trial

/S/ J. C. VALDER
Superintendent–Transportation

Date 4/16/74

EXHIBIT G-a(1), NOTICE OF FORMAL HEARING, ANNEXED TO FOREGOING AFFIDAVIT

(Letterhead of The Long Island Rail Road,
Jamaica Station, Jamaica, New York 11435)

April 24, 1974

Mr. Raymond J. Mills, Local Chairman
United Transportation Union
Local 645
Box 368, Central Station
Jamaica, New York 11435

Dear Mr. Mills:

This is in reply to your letter of April 18, 1974, wherein you requested a fair and impartial trial relative to your "Third" Run Failure.

Please be advised that this case has been docketed for hearing before the American Arbitration Association on May 24, 1974. This case was originally identified as Docket 74-6, Case No. 2, but for the sake of keeping the cases in chronological order, the case will be changed to Docket 74-6, Case No. 1.

By copy of this letter, we are asking the American Arbitration Association to arrange for recording services for the reason that the hearing will be of a formal nature.

Very truly yours,

/s/ R. E. PETERSON
R. E. Peterson
Superintendent–Personnel Management

cc: Mr. J. C. Solomon, Supervisor–
Labor Tribunals
American Arbitration Association

Mr. H. J. Pryor, General Chairman
United Transportation Union

EXHIBIT G-a(2), NOTICE OF FORMAL HEARING, ANNEXED TO FOREGOING AFFIDAVIT

(Letterhead of The Long Island Rail Road,
Jamaica Station, Jamaica, New York 11435)

April 24, 1974

Mr. Raymond J. Mills, Local Chairman
United Transportation Union
Local 645
Box 368, Central Station
Jamaica, New York 11435

Dear Mr. Mills:

This is in reply to your letter of April 18, 1974, wherein you requested a fair and impartial trial relative to your "Fourth" Run Failure.

Please be advised that this case has been docketed for hearing before the American Arbitration Association on May 24, 1974. This case was originally identified as Docket 74-6, Case No. 1, but for the sake of keeping the cases in chronological order, the case will be changed to Docket 74-6, Case No. 2.

By copy of this letter, we are asking the American Arbitration Association to arrange for recording services for the reason that the hearing will be of a formal nature.

Very truly yours,

/s/ R. E. PETERSON
R. E. Peterson
Superintendent–Personnel Management

cc: Mr. J. C. Solomon, Supervisor–
Labor Tribunals
American Arbitration Association

Mr. H. J. Pryor, General Chairman
United Transportation Union

Affidavit of Harry F. Simmons

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF SUFFOLK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF SUFFOLK, *ss.*:

HARRY F. SIMMONS, being duly sworn, deposes and says:

1. That your deponent has been employed by the defendant, The Long Island Railroad Company since 1969 and since said date and at all times hereinafter mentioned has been a member of the United Transportation Union (T).

2. That your deponent resides at 180 St. Nicholas Avenue, Apartment 32, New York, New York.

3. That your deponent incorporates by reference those allegations contained in the affidavit of Raymond Mills and numbered 3 through 8 with the same effect as if set forth at length herein.

4. That your deponent was advised that as a result of a run failure on December 25th, 1973, your deponent would be suspended for a period of 15 days.

5. That your deponent was in fact suspended for a period of 15 days during the month of February, 1974, and

that your deponent was not accorded a full, fair and impartial hearing and trial prior to said suspension. That as a result of said suspension your deponent lost all pay for the period of said suspension.

6. That in addition, your deponent was advised on January 12th, 1974, that your deponent would be suspended for a period of 30 days as a result of an additional run failure. That your deponent has never been suspended as a result of said notification of January 12th, 1974, but as a result of the run failure which occurred on March 23rd, 1974, your deponent was advised in writing on April 2nd, 1974, that your deponent was dismissed from the employ of The Long Island Railroad. (Annexed hereto, made a part hereof and marked Exhibit "H" is a true and exact copy of said written notice of dismissal.)

7. That your deponent was dismissed effective April 2nd, 1974, from the employ of The Long Island Railroad Company, and at the time of said dismissal your deponent was not accorded the opportunity of a trial and fair hearing prior to said dismissal.

8. That your deponent subsequent to said dismissal and on the 19th day of April, 1974, your deponent pursuant to demand was accorded a trial.

9. That said trial was conducted on behalf of The Long Island Railroad Company by Mr. W. M. Glennon, Assistant Trainmaster who acted not only as the prosecutor for said case, but as the Judge for said case. (Annexed hereto, made

a part hereof and marked Exhibit "I" is a true and exact copy of said hearing transcript.)

10. That subsequent to said hearing and in a letter dated the 23rd day of April, 1974, your deponent was advised by The Long Island Railroad Company that the dismissal imposed on April 2nd, 1974, would remain in effect. (Annexed hereto, made a part hereof and marked Exhibit "J" is a true and exact copy of said letter of April 23rd, 1974.)

11. That your deponent respectfully submits to this Court that the two aforementioned letter agreements and the aforementioned hearing violate your deponent's rights in the following manner:

a) Since the original contract dated February 17th, 1972, was subject to a ratification by the membership of the union, any modification and change to a substantial section of said contract was also subject to the ratification of the union membership.

b) Since said letter agreements were never approved at a meeting of the General Committee of Adjustments they are not binding upon your deponent or other members of the union.

c) That said letter agreements violate your deponent's constitutional rights as provided for in the Fourteenth Amendment of the United States Constitution as well as Article 1, Section 6 and Article 1, Section 1 of the New York State Constitution.

d) That since an employee of the defendant, Long Island Railroad Company, acted as both judge and prosecutor at the April 19th, 1974 dismissal hearing, your deponent was denied due process at said hearing as required by the Fourteenth Amendment to the United States Constitution and Article 1, Section 6 of the New York State Constitution.

WHEREFORE, your deponent respectfully requests that the within application be in all respects granted.

HARRY F. SIMMONS

(Sworn to by Harry F. Simmons on May 17, 1974.)

EXHIBIT H, NOTICE OF DISMISSAL, ANNEXED TO FOREGOING AFFIDAVIT

THE LONG ISLAND RAIL ROAD

NOTICE OF DISCIPLINE FOR RUN FAILURE

File No. RF 151-74 Date MARCH 26, 1974

Name H. F. SIMMONS Occupation PASSENGER TRAINMAN #12299

Under the agreement reached between the United Transportation Union and the Long Island Rail Road, effective Monday, June 25, 1973, the following procedures for handling discipline in connection with run failures are in effect.

Discipline will be assessed on the following schedules:

(1) First run failure, "Talk Session" with the appropriate Assistant Superintendent or his representative.

(2) Second run failure, record assessed with a "Reprimand".

(3) Third run failure, an actual "Fifteen (15) days Suspension".

(4) Fourth run failure, an actual "Thirty (30) days Suspension".

It is understood that repeated run failures can result in a successive imposition of the discipline specified in either steps 1, 2, 3, or 4, subject only to the restrictions of the twelve month period referred to herein below.

Exhibit H, Notice of Dismissal

(5) Five run failures within any twelve (12) month period will result in the employes "Dismissal".

You may appeal the discipline imposed in steps 3, 4 and 5 in accordance with the provisions of Article 42 (k) of the working agreement provided you notify the Superintendent —Personnel Management within ten (10) days of the date the assessed discipline becomes effective.

Outline of Offense

FAILING TO COVER YOUR ASSIGNMENT, RUN #336, ON SATURDAY, MARCH 23, 1974.

Number of Run Failures to Date FIVE (5)
Discipline Imposed DISMISSAL

/s/ J. C. VALDER
Superintendent–Transportation

/s/ HARRY F. SIMMONS
Date 4/2/74

EXHIBIT I, HEARING TRANSCRIPT, ANNEXED TO FOREGOING AFFIDAVIT

Affidavit

I, Anne Walton, was present at the formal proceedings of Mr. H. F. Simmons, Passenger Trainman, on April 19, 1974 and took verbatum notes, transcribed these notes accurately and the copy to which this affidavit is attached is a true and accurate copy of the formal proceedings.

/s/ Anne P. Walton
Anne P. Walton
Stenographer

County of Queens
State of New York

Sworn and subscribed to before me this 24 day of April 1974.

/s/ Marion L. Case
Marion L. Case
Notary Public, State of New York
No. 30-0571925
Qualified in Nassau County
Commission Expires March 30, 1973

Exhibit I, Hearing Transcript
Formal Hearing of Mr. H. F. Simmons, Psgr. Trnmn. 74-137 4/19

THE LONG ISLAND RAIL ROAD 74-137 4/19/74

Formal Hearing of:

Mr. H. F. Simmons, Psgr. Trnmn.

Held by:

Mr. W. M. Glennon, Assistant
Trainmaster, Trial Officer.
Jamaica Station Building

April 19, 1974

In the Presence of:

Mr. M. F. Burke, Local Chairman, UTU
Anne Walton, Stenographer

In Connection With:

Failing to cover your assignment
Run 336, on Saturday, March 23, 1974.

Mr. Glennon

This is the formal hearing which is being held at the request of Mr. H. F. Simmons in a letter dated April 3, 1974 to Mr. J. C. Valder, Superintendent—Transportation, Long Island Rail Road, Jamaica Station, Jamaica, New York 11435. The letter reads: Dear Sir: This has reference to the June 4, 1973 Agreement and the modification of said Agreement dated December 14, 1973 regarding Run Failures. Please be advised that Mr. H. F. Simmons desires a

Exhibit I, Hearing Transcript

Formal Hearing of Mr. H. F. Simmons, Psgr. Trnmn. 74-137 4/19

Formal Hearing in connection with the Notice of Discipline for Run Failure dated March 26, 1974, RF 151-74. Please advise. Very truly yours, H. J. Pryor, General Chairman, U.T.U.

In response to the April 3 letter the following letter was directed to Mr. H. J. Pryor, General Chairman U.T.U. 647 Franklin Avenue, Garden City, N.Y. This letter was dated April 9, 1974 and states: Dear Mr. Pryor: This is in reference to your letter of April 3, 1974, requesting a formal hearing in connection with the notice of discipline for dismissal for Trainman H. F. Simmons, dated March 26, 1974 (Run Failure 151-74). Please be advised that the formal hearing will be held on Friday, April 19, 1974, in Room 301, Jamaica Station Building, Jamaica, New York. Very truly yours, J. C. Valder, Superintendent—Transportation. Copy of this letter was sent to H. F. Simmons requesting his presence at this formal hearing, it also states you may, if you so desire, be accompanied by one or more persons of your own choosing, subject to the terms of the applicable scheduled agreement, without expense to the company. You may produce witnesses in your own behalf, without expense to the company, and you or your representative may cross examine these witnesses.

Mr. Glennon to Mr. Simmons

Q. Mr. Simmons, did you receive a copy of the April 9th letter? A. No, I didn't get it. I was called.

Q. Were you notified of the date of this hearing that you requested? A. Yes.

Exhibit I, Hearing Transcript

Formal Hearing of Mr. H. F. Simmons, Psgr. Trnmn. 74-137 4/19

Mr. Glennon to Mr. Simmons

Q. How were you notified? A. Over the phone.

Q. Who were you notified by? A. Mr. Dixon.

Mr. Glennon

The April 3 letter will be marked as exhibit 1 and the April 9 letter will be marked as exhibit 2 and will be made attachments to the transcript of this trial.

The April 9 letter which Mr. Simmons stated he did not receive was mailed to Mr. Simmons. The post office date stamp is April 10, 1974 it was sent to an address at 712 Crown Street, Apt. A-12, Brooklyn, N.Y. 11213. Stamped on the envelope is the notation, moved, left no address. This letter subsequently was returned to the Superintendent--Transportation, J. C. Valder.

Mr. Glennon to Mr. Simmons

Q. Mr. Simmons, would you state for the transcript what your address is? A. 180 St. Nicholaus Ave., Apt. 32, New York City 10026.

Q. How long have you been employed by the Long Island Rail Road? A. 5 years in September.

Q. Was the address previously mentioned by the trial officer where the letter was sent to ever your address Mr. Simmons? A. Yes.

Q. How long have you been living at the address you just gave 180 St. Nicholas Ave.? A. 10 months.

Q. During that 10 month period have you notified the carrier of your change of address? A. Yes.

Exhibit I, Hearing Transcript
Formal Hearing of Mr. H. F. Simmons, Psgr. Trnmn. 74-137 4/19

Q. When was this done, Mr. Simmons? A. Previous to my moving, I don't know just exactly when.

Mr. Glennon to Mr. Simmons

Q. Mr. Simmons, do you desire representation at this hearing, if so by whom? A. Yes, Mr. M. F. Burke.

Q. Do you have any witnesses? A. No, I don't.

Q. Mr. Simmons, are you prepared at this time to proceed with this hearing? A. Yes.

Mr. Glennon to Mr. Burke

Q. Mr. Burke, are you prepared to proceed with this hearing at this time? A. Yes, I am.

Mr. Glennon

> At this time I will present as attachment 4 to the transcript of this hearing notice of discipline for run failure, file RF151-74 in connection with H. F. Simmons IBM #12299, occupation, Passenger Trainman. This notice reads as follows: Under the agreement reached between the United Transportation Union and the Long Island Rail Road, effective, Monday, June 25, 1973, the following procedures for handling discipline in connection with run failures are in effect. Discipline will be assessed on the following schedules: 1) First run failure, "Talk Session" with the appropriate Assistant Superintendent or his representative 2) Second run failure, record assessed with a "Reprimand". 3) Third run failure, an actual "Fifteen (15) days suspension."

4) Fourth run failure, an actual (30) Thirty days suspension. It is understood that repeated run failures can result in a successive imposition of the discipline specified in either steps, 1, 2, 3 or 4, subject only to the restrictions of the twelve month period referred to herein below 5) Five run failures within any twelve (12) month period will result in the employes "Dismissal". This notice of discipline for run failure is signed and dated in the lower left-hand corner.

Mr. Glennon to Mr. Simmons

Q. Mr. Simmons, at this time I ask you if this is your signature and if you did sign this notice of discipline for run failure? A. Yes.

Mr. Glennon

Attached to the notice of discipline for run failure #5 is a run failure report from the Manager—Transportation Manpower dated March 23, 1974, this report indicates the assignment, Conductor Simmons was to cover on March 23, 1974, his occupation on that date, class of service, his service date and address which was on hand that date when the crew dispatcher office also indicates the run failure was reported by 204 which is the movement bureau date reported was 6:12 A.M. and Mr. Simmons was required to report at 5:56 A.M., the assignment was covered by Trainman H. A. Smith, explanation for this report states this man never reported to cover

his regular assignment, J. MacMurray, Crew Dispatcher. Step #5 of the agreement for handling discipline in connection with run failures states that 5 run failures in any 12 month period will result in the employees dismissal, it must be pointed out Mr. Simmons first run failure occurred on August 16, 1973 when he failed to cover his assignment on that date, run 98.

Mr. Burke

At this time I would have to object to each individual run failure of Mr. Simmons run failures being put into the transcript, I am not prepared to defend each and every run failure of Mr. Simmons which led up to step 5, however, Mr. Simmons and myself agree at this point in time he has reached step 5 of the 5th run failure agreement.

Mr. Glennon

Mr. Burke, the hearing officer had no intention of reading each and every run failure into the transcript of this hearing, but it was felt and it is felt that it was necessary to indicate that his first and fifth run failures did occur within a 12 month period.

Mr. Glennon to Mr. Simmons

Q. Mr. Simmons, at this time I will ask you if agree that within a 12 month period you did have 5 run failures? A. Yes.

Exhibit I, Hearing Transcript

Formal Hearing of Mr. H. F. Simmons, Psgr. Trnmn. 74-137 4/19

Mr. Glennon

To further clarify the agreement of June 25, 1973 a further agreement between President W. L. Schlager, Jr. and General Chairman, H. J. Pryor was reached in a letter dated December 14, 1973 addressed to Mr. H. J. Pryor General Chairman, U.T.U. 647 Franklin Avenue Garden City, N. Y. Dear Mr. Pryor: This is further in connection with the several conversations you had with Mr. R. E. Peterson, Superintendent—Personnel Management, seeking clarification of the "appeal" provisions of the June 4, 1973 letter Agreement covering run failures. It was agreed that before the involved employe can be permanently discharged, as provided in Step 5, he may be accorded a formal hearing, if he desires, and so notifies the Superintendent within 10 days of the date he is notified of the discipline. This provision will apply likewise to the two cases presently being progressed to the American Arbitration Association; namely, J. T. Cannon, Case RF 341-73 and B. Jones, Case RF 375-73. It is further understood that, except for the modification listed herein above, the June 4, 1973 agreement remains in full force and effect. If the foregoing correctly expresses your understanding of the matter, please affix your signature at the place provided below returning the original and one signed copy for our files. Very truly yours, W. L. Schlager, it is al signed by H. J. Pryor indicating he concurs. The notice of discipline for the first run failure will be marked as exhibit 5 and

the letter from W. L. Schlager to H. J. Pryor will be marked as exhibit 6 and made a part of the trial transcript.

Mr. Glennon to Mr. Burke

Q. At this time Mr. Burke, do you have any questions you care to ask of Mr. Simmons? A. Yes.

Mr. Burke to Mr. Simmons

Q. Mr. Simmons, I see that run failure #5 occured on Saturday March 23, 1974 for run 336, would you please state for the record your reason for not reporting for your assignment on the day in question? A. On Friday, the 22 I wasn't sure whether I was supposed to be off the weekend before my vacation or not, I called the Crew Dispatcher and let him know I was supposed to be going on vacation, he asked me to wait a minute, he came back and told me to have a nice vacation, I took this for meaning that I would be off the weekend prior to my vacation starting the next morning I received information that I had been marked off for a miss, I consequently returned the crew dispatchers call to find out why I had been put in for a miss, it was indicated at the time that I was not supposed to be off for the weekend I consequently worked the next day, Sunday.

Q. You state you worked run 336 on Sunday, the 24th? A. Yes.

Q. Did you receive a vacation in 1973? A. No, I didn't.

Q. When was the last time you received a vacation? A. February, 1972.

Exhibit I, Hearing Transcript
Formal Hearing of Mr. H. F. Simmons, Psgr. Trnmn. 74-137 4/19

Q. At that time to the best of your memory did you have Saturdays and Sundays off on the job you owned? A. To be positive I don't know.

Q. You state you were under the impression that vacations began on the weekend preceding the vacation? A. Yes, the reasons I was under that impression thats why I called the crew dispatcher the previous day.

Q. How long have you been employed by the railroad? A. September 15, 1969.

Q. Approximately 5 years, correct? A. Yes.

Mr. Burke to Mr. Simmons

Q. And over this period of 5 years do you have any other run failures that weren't mentioned in this testimony? A. No.

Q. In fact you have been late for your assignment 5 times in 5 years? A. Yes.

That's all.

Mr. Glennon

> The hearing officer will have to state at this time as was pointed out by Mr. Burke previously, we are not interested in any run failures other than the run failure of March 23, 1974.

Mr. Glennon to Mr. Simmons

Q. Mr. Simmons, you stated you called the crew dispatcher on the evening of March 22, do you recall what time you called the crew dispatcher? A. I took no notice of the time on Friday, March 22, I had thought it was be-

tween the hours of 8 and 11 P.M. by giving a time span of 3 hours I think it is evident I was not quite sure as to what time I did call the Crew Dispatcher.

Mr. Glennon

> At this time I will enter as exhibit 7 a note from Assistant Superintendent—Passenger, L. W. Dixon, this note states a request was made by United Transportation Union Committeeman, M. F. Burke, Local Chairman, for Conductors that he would like to listen to a conversation that took place between H. F. Simmons and the Crew Dispatchers Office, either on extension 214 or 215, on the evening of March 22, 1974, between the hours of 8:00 P.M. and 11:00 P.M. On Thursday afternoon, April 18, 1974, at approximately 2:30 P.M., in the presence of Mr. Burke and the undersigned, we listened to over three hours of tape covering the period of time so mentioned. We were unable to detect any conversation that was supposed to have taken place on the evening of March 22, 1974 between the hours of 8 P.M. and 11:00 P.M., between the Crew Dispatcher and Mr. Simmons.

Mr. Glennon to Mr. Burke

Q. Mr. Burke, I ask you if you agree with this information forwarded by Mr. Dixon? A. Yes, I do.

Mr. Glennon to Mr. Simmons

Q. Mr. Simmons, do you care to question the author of this document? A. No, however, I would like to make it

known I am not sure of the exact time of the conversation with the crew dispatcher I thought it was between 8 and 11:00 P.M.

Mr. Glennon

> Entered as exhibit 8 is page 7 of the 1974 vacation schedule for train service employees under the heading of week 13, March 25 are a list of men scheduled for vacation the week of March 25, among those names is H. F. Simmons. This list of scheduled vacations has been posted on all bulletin boards has been available to all men in train service.

Mr. Glennon to Mr. Simmons

Q. Mr. Simmons, I ask you at this time, if you are aware that you had vacation starting March 25, which was week 13? A. I am aware after calling the Crew Dispatcher.

Q. Is that the first time you became aware of the fact that you had week 13 as part of your vacation? A. I did not put in a vacation pick in November of 1973, therefore I was assigned a vacation in my seniority order and knowing the men around my seniority were on vacation at this time I made a phone call to the crew dispatcher to check and see when my vacation was listed that's the only actual knowledge I had of when my vacation began.

Q. When did you make that phone call to find out when your vacation was listed for? A. Friday, March 22.

Mr. Glennon to Mr. Simmons

Q. What your saying is up to that date you are not aware when you were going on vacation at all during the

year of 1974? A. I had vague knowledge of when I was going on vacation I knew it was in March and to the best of my recollection I got it by word of mouth.

Q. The list of vacations is dated December 3, 1973, did you at anytime check the list to see if you were going on vacation? A. No.

Q. Mr. Simmons, what were the normal relief days on your assignment? A. Wednesday and Thursday.

Q. Did you cover your assignment on Friday, March 22? A. Yes, I did.

Mr. Glennon to Mr. Burke

Q. Mr. Burke, do you have any questions? A. Yes.

Mr. Burke to Mr. Simmons

Q. Mr. Simmons, after reaching step 4 on the run failure agreement, did you realize the seriousness of another run failure? A. Yes, I did.

Q. And again I would ask you if you had any doubt in your mind that on Saturday, March 23, you were legally relieved from your assignment? A. I was under the impression I was supposed to be off, for that weekend prior to my vacation after my call to the crew dispatcher.

Mr. Glennon to Mr. Simmons

Q. Can you recall at this time what time you made your phone call to the crew dispatcher? A. It might have been earlier than 8 o'clock but I know it wasn't after 11:00 P.M.

Exhibit I, Hearing Transcript
Formal Hearing of Mr. H. F. Simmons, Psgr. Trnmn. 74-137 4/19

Mr. Glennon to Mr. Simmons

Q. Mr. Simmons, where did you make the phone call from? A. Flatbush Ave. Station telephone outside the information booth.

Q. Mr. Simmons, on Friday, March 22, did your assignment 336 cover run 110? A. Yes.

Q. Did you make the phone call to the crew dispatcher before 3:00 P.M.? A. No, I didn't as a matter of fact the only reason for my calling was because I waited until after I had noticed the board done and my job not open, I did consequently call the crew dispatcher that is what prompted my call.

Q. Did you call during your assignment before or after your assignment? A. After my assignment, after the board had come out.

Q. Could you possibly pinpoint the time any closer as to when you did call rather than just before 8:00 P.M. maybe? A. The only clarification I could give on the time is I don't believe I could have made a call prior to 3:00 P.M. on that date.

Q. Do you recall who you spoke to in the crew dispatchers office? A. No, I do not.

Q. But you do state it was somewhere within a 5 hour period between 3 P.M. and 8 P.M., is that correct? A. Yes.

Q. You have no idea of who you spoke to at all is that right Mr. Simmons other than that it was a crew dispatcher? A. Correct.

Q. Mr. Simmons, do you have anything further to add to the transcript of this hearing? A. I would only like to

state I enjoy my employment with the railroad I have tried to do my job properly in my 5 years of service and I knew the seriousness of 5 run failures under the present agreement I was sure and there was no doubt in my mind that on Saturday, March 23, I was to commence my vacation for the year of 1974. However, I realize now my error and it was completely my mistake. After calling the crew dispatcher on the 23 I covered my assignment on the 24, feeling the company knew about the conversation between myself and the crew dispatcher, I am asking the consideration of my problem due to the fact that I have been employed by the railroad for 5 years with a good record except for my recent problems with run failures.

Mr. Glennon

This hearing is concluded at 3:10 P.M.

EXHIBIT J, LETTER, ANNEXED TO FOREGOING AFFIDAVIT

Letterhead of The Long Island Rail Road, Jamaica Station, Jamaica, New York 11435]

April 23, 1974

Mr. H. F. Simmons
180 St. Nicholas Ave.
Apt. 32
New York, N.Y. 10026

Dear Mr. Simmons:

Referring to the hearing held on Friday, April 19, 1974, in connection with discipline of Dismissal, as shown on notice of discipline for run failure RF151-74, reading:

> "Failing to cover your assignment Run #336, on Saturday, March 23, 1974."

You testified at the hearing that your telephone call to the Crew Dispatcher could have been made before 8:00 P.M. on March 22, 1974.

Therefore, the tape recording of all calls made to the Crew Dispatcher's Office between the hours of 2:00 P.M. and 8:00 P.M. on March 22, 1974 was monitored and no conversation between yourself and the Crew Dispatcher's Office was detected.

Exhibit J, Letter

As nothing was presented at the hearing that would warrant any change in the discipline, this is to advise the discipline issued in this case remains unchanged.

Very truly yours,

/s/ J. C. VALDER
J. C. Valder
Superintendent–Transportation

JCV:apw
cc: U.T.U.
Personnel
File

Affidavit of Richard T. Haefeli

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF SUFFOLK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF SUFFOLK, *ss.*:

RICHARD T. HAEFELI, Esq., being duly sworn, deposes and says:

1. That your deponent is associated with the firm of Meyer & Wexler, Esqs., attorneys for the plaintiff herein and as such is fully familiar with all of the facts and circumstances as hereinafter set forth.

2. That your deponent respectfully submits to this Court that pursuant to Title 11 of the Public Authorities Law of the State of New York, The Long Island Railroad Company is a subsidiary corporation of the Metropolitan Transportation Authority, which authority is an agency and political subdivision of the State of New York.

3. That pursuant to Section 1266 of the Public Authorities Law subdivision 5, The Long Island Railroad Company being a subsidiary corporation of the Metropolitan Transportation Authority is "subject to the restrictions and limitations to which the authority may be subject".

Affidavit of Richard T. Haefeli

4. That since the Metropolitan Transportation Authority is a political subdivision of the State of New York it is subject to all constitutional limitations imposed upon all other political subdivisions of a State. In view of the aforementioned Section The Long Island Railroad Company is also subject to the same constitutional limitations.

5. That your deponent respectfully submits to this Court that the letter agreements of June and December, 1973, between Walter J. Schlager, Jr., President of Long Island Railroad Company and Harold J. Pryor, General Chairman, United Transportation Union (T) not only violate the contractual rights of the plaintiffs herein but also violate their constitutional right of due process as provided for in the Fourteenth Amendment in the United States Constitution as well as Article 1, Section 6 of the New York State Constitution.

6. That in addition in view of the fact that the defendants have violated the plaintiffs contractual right not to be suspended or dismissed without a trial, said defendants' have also violated Article 1, Section 1 of the New York State Constitution which states as follows:

> No member of this State shall be disenfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers . . .

This Section of the Constitution was interpreted by the Court in *Cowly* v. *Bingham,* 107 N.Y. Supp. 1011

Affidavit of Richard T. Haefeli

> . . . the people of the State, speaking in the most solemn form, namely, through the State Constitution have declared that no person shall be deprived of any of his rights unless by the law of the land, or the judgment of his peers. See, *Van Allen* v. *McCleary,* 211 N.Y.S. 2d 501, 504.

That in view of the violation of the plaintiffs' constitutional rights and the irreparable injury being suffered by the plaintiffs as a result of the defendants' action, time is of the essence and unless the defendants are restrained pending a hearing, the plaintiffs will suffer irreparable injury, loss and damage.

7. That no prior application for the relief sought herein has been requested in this or in any other Court.

8. That the plaintiffs' simultaneously with this motion are instituting a Civil action requesting a declaratory judgment as well as an action requesting a permanent injunction against the aforementioned defendants. (Annexed hereto, made a part hereof and marked Exhibit "K" is a true and exact copy of said Summons and Verified Complaint.)

WHEREFORE, your deponent respectfully requests that the within application be in all respects granted.

RICHARD T. HAEFELI

(Sworn to May 17, 1974.)

EXHIBIT K, SUMMONS AND VERIFIED COMPLAINT ANNEXED TO FOREGOING AFFIDAVIT

Printed hereinbefore as Exhibits A and B to Petition for Removal at pp. 8a-18a.

EXHIBIT D, NOTICE OF CROSS-MOTION AND AFFIDAVITS IN SUPPORT THEREOF, ANNEXED TO PETITION FOR REMOVAL

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF SUFFOLK

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affidavits of ROBERT E. PETERSON and LAWRENCE W. DIXON, dated the 28th day of May, 1974, and upon all of the pleadings and proceedings heretofore had and held herein, the undersigned will move this Court at a Special Term, Part I thereof, to be held at the Courthouse located at Griffing Avenue, Riverhead, New York, on the 30th day of May, 1974, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for an order in favor of defendant, The Long Island Rail Road Company and against the plaintiffs Raymond Mills and Harry F. Simmons.

A. Pursuant to CPLR 3211(a)(2) granting judgment by dismissing the complaint upon the ground that the court has no jurisdiction of the subject matter of this action.

Exhibit D, Notice of Cross Motion and Affidavits

B. Pursuant to CPLR 3211(a) 7 granting judgment by dismissing the complaint upon the ground that the pleadings fail to state a cause of action,

OR

C. Pursuant to CPLR 3212(b) granting summary judgment dismissing the complaint,

AND

D. For such other and further relief as to this Court may seem just and proper.

Dated: Jamaica, New York
May 28, 1974

Yours, etc.

GEORGE M. ONKEN
Attorney for Defendant,
The Long Island Rail Road Company

To:

MEYER & WEXLER, Esqs.
Attorneys for Plaintiffs

Affidavit of Robert E. Peterson

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF SUFFOLK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF QUEENS, *ss.*:

ROBERT E. PETERSON, being duly sworn, says:

I am Superintendent—Personnel Management for The Long Island Rail Road Company, defendant herein (hereinafter LIRR), and I make this affidavit in support of LIRR's Cross Motion to dismiss the complaint or in the alternative for summary judgment and in opposition to plaintiffs' application for a preliminary and permanent injunction. As Superintendent—Personnel Management for LIRR, I am familiar with and responsible for, in conjunction with the President of the Railroad, the negotiation of the various collectively bargained labor agreements with the labor unions representing the employees of the LIRR. More particularly, I am familiar with the negotiation of the collectively bargained agreement between LIRR and the United Transportation Union dated February 17, 1972, and the letter agreements dated June 4, 1973, and December 14, 1973, between LIRR and Harold J. Pryor, General Chairman of the defendant, United Transportation Union.

In the negotiation of the aforesaid agreement of February 17, 1972, the LIRR and the United Transportation Union,

in order to expedite the handling of disciplinary proceedings while still affording full and complete protection to the individual employee, provided, in Article 42 paragraph (k), that appeals from disciplinary decisions of the Superintendent would be handled before the American Arbitration Association. The procedure to institute such an appeal is detailed in paragraph (j) of Article 42. Prior to the institution of this appellate procedure to the American Arbitration Association, appeals from the disciplinary decisions of the Superintendent—Transportation of the LIRR would have to proceed either to the National Railroad Adjustment Board in Chicago or a Special Board of Adjustment (commonly referred to P.L. Board) created by specific agreement between the union and the Railroad. Both of these procedures often proved to be time-consuming and thus, unsatisfactory to the Railroad, the union and the individual employee involved. The appellate procedure to the American Arbitration Association has proven to be an expedited procedure which has enabled the individual employee, the union and the Railroad the opportunity to completely, fully and fairly present their evidence and arguments to an impartial arbitrator and up until the instant complaint, has been acceptable to all parties concerned.

As indicated in the affidavit of Lawrence W. Dixon, submitted simultaneously herewith, the problem of run failures has been a constant and vexing one to the Railroad and after consideration by the officers of the Railroad and the union, the procedures set forth in the letter agreements of June 4, 1973, and December 14, 1973, were agreed upon as a reasonable, expeditious and fair procedure to cope with this problem.

Affidavit of Robert E. Peterson

In dealing with the defendant, Harold Pryor, General Chairman of the United Transportation Union, the Railroad has always understood and still understands that, pursuant to the constitution and by-laws of the United Transportation Union, Mr. Pryor, as General Chairman, had full authority to negotiate and enter into such an agreement. In paragraph 8 of the affidavit of Raymond Mills submitted in support of the plaintiffs' Order to Show Cause and application for preliminary and permanent injunction, reference is made to Article 85 of the constitution of the United Transportation Union, and annexed thereto is a portion of said Article 85, which relates to the duties of the General Committees of Adjustment. As shown on that portion of Exhibit D marked as page 103, lines 32-37, the constitution of the United Transportation Union specifies "Between sessions of the General Committee of Adjustment, the Chairman of such Committee shall exercise all rights, privileges, and authority vested in the General Committee, except as otherwise directed by the General Committee while in session." Mr. Pryor, as Chairman of the aforesaid General Committee of Adjustment, thus, by the very terms of the constitution cited by Mr. Mills, apparently had full power and authority to enter into negotiations and to sign the letter agreements of June 4, 1973, and December 14, 1973, since to the best of LIRR's knowledge, the General Committee of Adjustment was not in session and had not directed otherwise.

The three agreements heretofore referred to, namely, the agreement of February 17, 1972, the letter agreements of June 4, 1973, and December 14, 1973, are all collectively bargained agreements made pursuant to the provisions of

the Railway Labor Act, and it is my understanding and I have been so advised by counsel, that these agreements may only be modified in accordance with the procedures of the Railway Labor Act and that modification of the agreements by this Court, according to the advice of Counsel, would be beyond the power of the Court. It is my understanding from counsel that the plaintiffs are, in effect, presenting a grievance which involves the application of collectively bargained agreements and, thus, is a matter to be resolved solely within the framework of the Railway Labor Act and in this regard plenary jurisdiction is vested with the National Railroad Adjustment Board.

WHEREFORE, it is respectfully requested that the plaintiffs' application for a preliminary and permanent injunction be denied in its entirety and that the defendant LIRR's Cross Motion to dismiss the complaint or in the alternative for summary judgment be granted and for such other and further relief as seems just and proper.

ROBERT E. PETERSON

(Sworn to by Robert E. Peterson on May 28, 1974.)

Affidavit of Lawrence W. Dixon

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF SUFFOLK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF QUEENS, *ss.*:

LAWRENCE W. DIXON, being duly sworn, says:

I am Assistant Superintendent—Passenger, for The Long Island Rail Road Company, defendant herein (hereinafter LIRR), and I make this affidavit in support of the defendant LIRR's Cross Motion to dismiss or in the alternative for summary judgment and in opposition to plaintiffs' application for a preliminary and permanent injunction. As Assistant Superintendent—Passenger of LIRR, I am personally familiar with the various disciplinary procedures and proceedings in regard to LIRR employees in train service and more particularly, I am familiar with the disciplinary proceedings regarding the plaintiff, Harry F. Simmons, referred to in his affidavit as a result of a run failure by him on March 23, 1974, which resulted in his dismissal from the service of the LIRR.

In paragraphs 9 and 11d of his affidavit, Mr. Simmons alleges that Mr. W. M. Glennon, Assistant Train Master of LIRR, not only conducted the company hearing on Mr. Simmons' fifth run failure, but acted as prosecutor and

judge in said company hearing. This allegation is completely false. Mr. Glennon acted as the trial officer and had the sole duty of presiding at the company hearing on Mr. Simmons for the reception of testimony and evidence. As the trial officer, Mr. Glennon had the duty, as is customary in all such company hearings and trials, of asking appropriate and necessary questions of the various witnesses, and of seeing to it that various documentary evidence was introduced so that there would be a complete record. Upon the conclusion of the said company hearing, Mr. Glennon, as is customary, reviewed the transcript to be sure of its accuracy and submitted it to me without making any judgments, decisions or recommendations, since none of these were his function in the disciplinary process. Upon receipt of the transcript and exhibits from Mr. Glennon, I reviewed the same and in my function as Assistant Superintendent—Passenger, submitted the same to Mr. Joseph C. Valder, Superintendent of Transportation, with my recommendation that the discipline of dismissal, as specified in the controlling agreements, be affirmed. Mr. Valder, to my personal knowledge, reviewed the transcript and personally made the decision that the discipline of dismissal in this instance would be affirmed. Therefore, the allegation by Mr. Simmons that Mr. Glennon acted as prosecutor and judge, as I indicated hereinabove, is completely false.

In performing my function of reviewing the transcript and submitting it to Mr. Valder with a recommendation, had Mr. Simmons introduced any evidence excusing or justifying his run failure, it would have been my duty to recommend that the run failure be completely excused. In the course of the hearing before Mr. Glennon, Mr. Simmons

had every opportunity to justify or excuse his run failure. The excuse he offered prior to his hearing, namely, that he had telephoned in to the crew dispatcher between 8 p.m. and 11 p.m. on March 22, 1974, and had been told by the crew dispatcher that he was free to go on vacation, upon investigation and as is amply shown in the trial transcript annexed as an exhibit to Mr. Simmons' affidavit, was completely false. Prior to the hearing, a committee consisting of myself and two representatives of the union representing Mr. Simmons listened to the tape recordings of all telephone conversations between the crew dispatcher and train service employees calling in during the period in question. No evidence was found on these tapes that Mr. Simmons had ever called in. Confronted by these facts at his formal hearing, Mr. Simmons then stated that his call to the crew dispatcher's office could have been made earlier than 8 p.m. on March 22, 1974, but not earlier than 3 p.m. on such date. In order to be completely fair to Mr. Simmons, I then took it upon myself to listen to additional hours of the tape recordings in the event that he was originally mistaken as to the time he allegedly called in, and as is shown in Exhibit J to Mr. Simmons' affidavit, again I could not find any record of any conversation between him and the crew dispatcher's office during the six-hour period between 2 p.m. to 8 p.m. on March 22, 1974. It was on this basis that I made my recommendations to Mr. Valder and that Mr. Valder made his decision to affirm the discipline of dismissal.

The problem of run failure on LIRR has been a serious and long-standing one which has and can cause numerous problems in the complex operation of LIRR transportation

service. When personnel fail to show up to cover their scheduled runs, this can result in delay to trains while substitute crew members are found and assigned to the job and often in such instances can result in substantial financial penalties to the Railroad if the substitute ends up, pursuant to the terms of the various applicable agreements, as being entitled to overtime or other penalty rates for covering a job not properly his own.

During the calendar year 1973, the Railroad had a total of 806 run failures in regard to train service employees, and of these 806 run failures, 452 resulted in disciplinary action. In other words, the Railroad recognized that reasonable and justifiable excuses do exist in a substantial number of cases and where such excuses are brought forth either in the counseling sessions provided for in the letter agreements or in the course of the hearings provided for in the letter agreements, full cognizance is taken of such justifiable excuses and the individual employee is excused and not subjected to discipline. This, incidentally, occurred in the case of plaintiff Mills in regard to a run failure on his part on October 23, 1973.

The run failures that result in disciplinary action are those where no justification is advanced or made apparent at the hearings, and such hearings, whether held on the property in connection with a fifth run failure in a 12-month period or at the hearings before the American Arbitration Association, are designed to give the individual employee a full and ample opportunity to advance such justification, excuses or defenses as is appropriate and proper. In other words, each individual employee is being given full and ample due process.

Affidavit of Lawrence W. Dixon

WHEREFORE, it is respectfully requested that the plaintiffs' application for a preliminary and permanent injunction be denied in its entirety and that the defendant LIRR's Cross Motion to dismiss the complaint or in the alternative summary judgment be granted and for such other and further relief as seems just and proper.

LAWRENCE W. DIXON

(Sworn to by Lawrence W. Dixon on May 28, 1974.)

EXHIBIT E, AFFIDAVIT OF HAROLD J. PRYOR IN OPPOSITION TO PLAINTIFFS' ORDER TO SHOW CAUSE

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF SUFFOLK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF SUFFOLK, *ss.*:

HAROLD J. PRYOR, being duly sworn, deposes and says:

I am the General Chairman of the United Transportation Union, which organization represents the operating employees on the Long Island Railroad. I have represented the membership in this capacity for more than twenty (20) years.

I have read many documents submitted in support of the plaintiffs' application and aver at the outset that these plaintiffs may not pursue this action in the Civil Court. Under the terms of the constitution, any complaint or grievance by a member of the United Transportation Union will be adjusted within the organization and an appellate procedure is graphically described in the constitution. Article 76 outlines the methods by which any members may go to the highest level of the organization to seek redress for any injustice he feels that he has suf-

fered. In the instant case, none of these procedures have been followed, and it is respectfully submitted that they must be followed before the plaintiffs can come before this Court and complain that any of their rights have been violated.

Plaintiffs have been members of the organization for some years now and have benefited by the increased salaries and benefits which have been negotiated by the organization for the benefit of all members. Having eaten of the fruit, they must now be bound by the regulations.

At this point, I do not address myself to the merit of their claim, but rather to the fatally defective procedure that is being followed.

The Chairman of the General Committee exercises all of the power of the General Committee itself and the General Committee has the right to make and interpret agreements with representatives of the Railroad covering rates of pay, rules and/or working conditions. Therefore, I, as General Chairman, may enter into agreements which I consider to be for the benefit of the membership. On June 4, 1973 and on December 14, 1973, I did exactly that. In order that the members of the organization would not have to lose pay while attending hearings or trials on disciplinary matters, particularly when those matters were run failures, a simplified procedure was adopted and the terms of that procedure were set forth in the letter agreement of June 4, 1973. Prior to the agreement, a member could be taken out of service the first time he was determined to have failed to appear for his scheduled assignment. That is no longer the case. Under the new arrange-

ment, the member cannot be taken out of service until the third time he has failed to report for a scheduled assignment, and it is not until the fifth time that he has failed that he is subject to dismissal. Prior to June 4, 1973, he was subject to dismissal on the first occasion.

It is important for the court to understand that a determination that a member has failed to report is only made when no good cause is shown for the failure. In practice, if a member fails to report and he has any reasonable excuse, a representative of the organization meets with the representative of management and produces evidence of the reason for the failure and the charge is "washed out". It never gets beyond that point but when a member fails to report and has not taken any steps to notify the Railroad or his organizational representative prior to the failure and is unable to document a reason for the failure, he is then subject to the disciplinary procedure described in the June 4, 1973 letter. A reading of that letter by the Court will acquaint the Court with what must be found before any member is subject to suspension or dismissal.

Further, in the event that a member feels that he has been unfairly dealt with after having been found to have failed to appear on five separate occasion within a twelve-month period and is then discharged, under the agreement reached on December 14, 1973, that member may file a notice of appeal and a request for a formal hearing. At the hearing he can be represented and introduce any and all evidence that might exculpate him from the determination of failure. Mr. Simmons, one of the plaintiffs,

did in fact request a formal hearing and a transcript of the testimony taken at that hearing is included in his moving papers. The Court may well consider the objectivity and impartiality of that hearing and the determination of dismissal that was confirmed.

At the time of the execution of the agreement of February 17, 1972, all prior contracts, agreements and understandings were merged. Up until the signing of the agreement, no contract was in force. The prior contract had expired. When, then, this new agreement was signed, it was submitted to a vote by the general membership and approved.

However, again as General Chairman of the General Committee of Adjustment, I am by definition of the constitution, its executive head. That Committee has the authority to make and interpret agreements with representatives of the Railroad. Further, between sessions of the General Committee, I have the authority to exercise all rights, privileges and authority vested in the Committee. These powers are all set forth in Article 85 and Article 87.

Under these powers, I can agree to an amendment or change in the agreement with the Railroad, and pursuant to that authority, I negotiated the amendments contained in the letters of June 7, 1973 and December 14, 1973. The amendments have expedited the disposition of alleged disciplinary cases. I have acted in the best interest of the Brotherhood, as I believe, however, if in fact I have acted beyond the scope of my authority, Brother Mills and Simmons have a remedy just as they allege that I have failed

to comply with the Constitution, they have too. The forum for testing the Constitutionality of my actions is the appellate process described in the constitution. They have remedies provided in the constitution, and as members of the Brotherhood they are bound by it. It is difficult for me as a Brother with nearly three times the service in the Brotherhood that Mr. Simmons and Mr. Mills have accumulated, to take issue with the allegations of my Brothers. Good and proper unionism requires that those who seek to benefit by organization must adhere to the constitution that has provided them with the benefits that they have enjoyed.

HAROLD J. PRYOR

(Sworn to by Harold J. Pryor on May , 1974.)

Affidavit of Raymond Mills in Support of Motion

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF SUFFOLK, *ss.*:

RAYMO' D MILLS, being duly sworn, deposes and says:

That your deponent is one of the plaintiffs in the present action and incorporates by reference his affidavit dated May 15th, 1974, submitted in support of the original Order to Show Cause dated May 20th, 1974.

That subsequent to the return date of the original Order to Show Cause, to wit: May 30th, 1974, your deponent on June 1st, 1974, was relieved of his duties with the Long Island Railroad Company for an alleged run failure.

That your deponent has not been allowed to work for the defendant, Long Island Railroad Company, since June 1st, 1974, although your deponent has worked for the defendant union in his capacity as a union representative on June 1st, 1974, June 3rd, 1974 and June 4th, 1974.

That on the 3rd day of June, 1974, your deponent was advised by Nelson Steele, Assistant Superintendent of the Long Island Railroad company that he was to sign a letter which was "the last step".

That on the 4th day of June, 1974, your deponent again spoke with Mr. Steele and was advised that the purpose

of signing said letter was to begin your deponent's time to request an appeal pursuant to the letter agreements of June 4th, 1973 and December 14th, 1973.

That on the 6th day of June, 1974 your deponent spoke with a Lawrence Dixon, Assistant Superintendent, Passenger of the Long Island Railroad Company and was advised that in order to obtain for your deponent his pay check, your deponent would have to sign a document which your deponent refused to do so. Mr. Dixon then advised your deponent that instead of signing said document, if your deponent would turn in his uniform, punch and stock, your deponent would receive his pay check. Your deponent asked Mr. Dixon if your deponent was fired and Mr. Dixon replied "no". Your deponent stated that if he was required to turn in his equipment he was fired. Mr. Dixon then advised your deponent that rather than signing the document or turning in his equipment that if your deponent would turn in his railroad pass he would receive his pay check.

On the 7th day of June, 1974, your deponent again spoke with Mr. Dixon who again requested that your deponent sign a letter advising your deponent that he was dismissed from the service of the Long Island Railroad Company and that he must sign said letter in order to receive his pay. That your deponent signed said letter under protest. That when your deponent received his check the amount set forth therein was approximately $200.00 less than what your deponent was entitled to and was advised by Mr. Dixon that in order to receive the $200.00 your deponent would have to return his equipment. (Annexed hereto,

made a part hereof and marked Exhibit "A" is a letter dated June 3rd, 1974, signed by J.C. Valder, Superintendent, transportation, stating that your deponent has been dismissed from the service of the Long Island Railroad Company.)

That on June 7th, 1974, the Long Island Railroad Company issued passenger notice number 27-74 stating that as of June 6th, 1974, your deponent was dismissed from the service of the Long Island Railroad Company. (Annexed hereto, made a part hereof and marked Exhibit "B" is a true and exact copy of said notice.)

That on September 24th, 1973, your deponent was advised by the President of the International United Transportation Union that Article 28 of the constitution of the United Transportation Union did not apply to a proceeding brought by a member of said union under the laws of the federal government or the state government. (Annexed hereto, made a part hereof and marked Exhibit "C" is a true and exact copy of said letter.)

That your deponent would advise the Court that members of the Long Island Railroad Company presently participate in a pension plan established by the Metropolitan Transportation Authority, the parent corporation to the Long Island Railroad Company.

WHEREFORE, your deponent respectfully requests the following:

1. Since the case is not one removable from the United States District Court, said case should be remanded to the Supreme Court, State of New York,

2. Due to the injury being sustained by your deponent, the defendant, Long Island Railroad Company should be stayed from proceeding with any further disciplinary action against your deponent and immediately reinstate your deponent with pay from June 1st, 1974, pending removal of the within action to the Supreme Court, State of New York, or in the alternative if the Court retains jurisdiction said relief should be granted pending a determination by this Court of the request for a preliminary injunction.

3. Since the Long Island Railroad Company has violated the stay issued by the Supreme Court, State of New York, your deponent respectfully requests that they be adjudged in contempt of Court.

RAYMOND MILLS

(Sworn to by Raymond Mills on June 11, 1974.)

EXHIBIT A, LETTER DATED JUNE 3, ANNEXED TO FOREGOING AFFIDAVIT IN SUPPORT OF MOTION

THE LONG ISLAND RAIL ROAD

NOTICE OF DISCIPLINE OR RUN FAILURE

File No. RF 263-74 Date JUNE 3, 1974

Name R.J. MILLS #13140 Occupation PASSENGER TRAINMAN

Under the agreement reached between the United Transportation Union and the Long Island Rail Road, effective Monday, June 25, 1973, the following procedures for handling discipline in connection with run failures are in effect.

Discipline will be assessed on the following schedules:

(1) First run failure, "Talk Session" with the appropriate Assistant Superintendent or his representative.

(2) Second run failure, record assessed with a "Reprimand".

(3) Third run failure, an actual "Fifteen (15) days Suspension".

(4) Fourth run failure, an actual "Thirty (30) days Suspension".

It is understood that repeated run failures can result in a successive imposition of the discipline specified in either steps 1, 2, 3, or 4, subject only to the restrictions of the twelve month period referred to herein below.

Exhibit A, Letter

(5) Five run failures within any twelve (12) month period will result in the employes "Dismissal".

You may appeal the discipline imposed in steps 3, 4 and 5 in accordance with the provisions of Article 42 (k) of the working agreement provided you notify the Superintendent —Personnel Management within ten (10) days of the date the assessed discipline becomes effective.

Outline of Offense

FAILING TO COVER YOUR ASSIGNMENT, COLLECTOR #800, ON FRIDAY, MAY 31, 1974

I am not signing this as an admission of 5th Run failure

I am signing under protest as run failures 3 & 4 have not been resolved

Number of Run Failures to Date FIVE (5)

Discipline Imposed DISMISSAL

/s/ R. J. MILLS

Date June 7th, 1974

/s/ J. C. VALDER
Superintendent—Transportation

Witness [Signature Illegible]

EXHIBIT B, NOTICE, ANNEXED TO FOREGOING AFFIDAVIT IN SUPPORT OF MOTION

THE LONG ISLAND RAIL ROAD

OFFICE OF ASSISTANT SUPERINTENDENT—PASSENGER
ASSISTANT SUPERINTENDENT—PASSENGER
NOTICE No. 27-74

June 7, 1974

From: N. E. Steele

To: All Concerned

Subject: Confiscation of 1974 Annual Passes

The following employees were dismissed from the service of the Company and have in their possession the Long Island Rail Road Annual Card Passes issued to them and their dependent spouses for 1974.

NAME	DISMISSED	PASS NUMBER	DEPENDENT NUMBER
H.F. Simmons	April 2, 1974	A6462	A14547
C. Moore	May 6, 1974	A3850	NONE
R.J. Mills	June 6, 1974	A6168	A14330

Therefore, be advised, the Annual Card Passes issued to these employees and their dependent spouses, *are not valid* for transportation.

Should they be presented for transportation, they are to be confiscated, proper fares collected and the confiscated passes forwarded to this office immediately.

/s/ N. E. STEELE
N. E. Steele
Assistant Superintendent—
Passenger

NES:apw

EXHIBIT C, LETTER, ANNEXED TO FOREGOING AFFIDAVIT IN SUPPORT OF MOTION

[Letterhead of United Transportation Union, Cleveland, Ohio]

645

September 24, 1973

Mr. Raymond J. Mills
Local Chairman—645
Box 368, Central Station
Jamaica, New York 11435

Dear Sir and Brother:

In reply to your letter of September 15 relative to interpretation of Article 28, the International could not proceed against a person who is exercising rights granted under federal or state law.

With best wishes, I am

Fraternally yours,

/s/ AL H. CHESSER
President

Affidavit of Richard T. Haefeli in Support of Motion

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF SUFFOLK, *ss.*:

RICHARD T. HAEFELI, Esq., being duly sworn, deposes and says:

That your deponent is associated with Meyer & Wexler, Esqs., attorneys for the plaintiffs herein, and as such is fully familiar with all of the facts and circumstances as hereinafter set forth.

That your deponent incorporates by reference his affidavit dated the 17th day of May, 1974, submitted in support of the Order to Show Cause dated May 20th, 1974.

The underlying action is a claim for violation by an agency of the State of New York of the constitutional rights of citizens of the State of New York which said rights are secured by the constitution of the State of New York.

Since the within action was initially instituted in the Supreme Court, State of New York, and removal requested by an agency of the State of New York, it should be dismissed, and said action remanded to the Supreme Court, State of New York, to allow said Court to initially interpret its own constitution.

Affidavit of Richard T. Haefeli

That your deponent submits that the defense of exhaustion of administrative remedies is inapplicable for the following reasons:

1. Said defense does not apply to an action involving a violation of constitutional rights.

2. Since both the union, which is the bargaining agent for the plaintiffs' and the Long Island Railroad Company agreed to the change, it would be fruitless for the plaintiffs' to resort to administrative remedies.

3. Since the international office of the union has interpreted Article 28 of the union constitution as being inapplicable to actions arising under either both federal or state law provisions set forth in said constitution requiring exhaustion of administrative remedies are inapplicable.

That your deponent respectfully submits that the Railroad Labor Act is inapplicable for the following reasons:

1. Said act does not apply when an action is pending against both the union and the railroad.

2. The union and the railroad have agreed that pursuant to Article 42(k) of the contract of employment that in the area of discipline the Railroad Labor Act does not apply.

3. The issues involved in the present case do not involve the interpretation of an existing agreement rather they involve a claimed violation of constitutional rights as a result of a breach of an existing agreement.

That no prior request for the relief requested herein has been made in this Court or in any other Court of rec-

ord other than the Order to Show Cause issued by the Hon. William R. Geiler, Justice, Supreme Court, State of New York, dated May 20th, 1974.

That in view of the irreparable injury presently being suffered by the plaintiffs' in the present action as well as the nature of the present action, an Order to Show Cause as well as a stay pending a determination of the request for a preliminary injunction is necessary.

WHEREFORE, your deponent respectfully requests that the Court issue an Order as follows:

1. Remanding the within matter to the Supreme Court, State of New York, County of Suffolk.

2. Staying the defendants from proceeding with any further disciplinary action against the plaintiffs and to immediate reinstate the plaintiff, Raymond Mills, to his position with pay from June 1st, 1974 pending removal of the within action to the Supreme Court, State of New York, or in the alternative if the within Court retains jurisdiction of the present matter, granting said relief pending a determination of the preliminary injunction.

3. Adjudging the defendant, Long Island Railroad Company, in contempt of Court for violating the stay issued by the Hon. William R. Geiler in an Order to Show Cause dated the 20th day of May, 1974.

RICHARD T. HAEFELI

(Sworn to by Richard T. Haefeli on June 10, 1974.)

Transcript of Proceeding

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

74 C 842

[SAME TITLE]

United States Courthouse
Brooklyn, New York
June 14, 1974
11 o'clock A.M.

Before:

HONORABLE ORRIN G. JUDD,

U.S.D.J.

ILENE GINSBERG
Acting Official Court Reporter

Appearances:

Messrs. MEYER & WEXLER
Attorneys for Plaintiff

By: LEONARD WEXLER, Esq.,
and
RICHARD HAEFELI, Esq.,
Of Counsel.

Lawrence W. Dixon—for L.I.R.R.—Direct

GEORGE M. ONKEN, Esq.,
Attorney for L.I.R.R.

By: RICHARD STOKES, Esq.,
and
BRIAN J. BARRETT, Esq.,
Of Counsel.

THOMAS J. HIGGINS, Esq.,
Attorney for United Transportation Union.

The Clerk: Civil Motion, Raymond Mills and Harry F. Simmons versus the Long Island Railroad, et al.

The Court: I think I just want to hear the witness about practice, if you can put him on.

Mr. Stokes: Yes, sir.

Mr. Dixon.

LAWRENCE W. DIXON, having been first duly sworn by the Clerk of the Court, was examined and testified as follows:

The Clerk: State your name for the record, please.

The Witness: Lawrence W. Dixon, D-I-X-O-N.

Direct Examination by Mr. Stokes:

Q. Mr. Dixon, by whom are you employed and in what capacity? A. I am employed by the Long Island Railroad as Assistant Superintendent of Transportation.

Q. How long have you been with the railroad? A. Going on 28 years.

Q. What various positions have you held with the railroad? A. Trainman, conductor, Assistant Trainmaster, Trainmaster, Manager of Trainmaster Schedules, Superintendent of Passengers, and Assistant Superintendent of Transportation.

Q. Now, what is your present title? A. Assistant Superintendent of Transportation.

Q. In that capacity, what are your general duties and responsibilities? A. My duties are the over all operation of the Long Island Railroad under the direction of the Superintendent of Transportation.

Q. Do you have responsibilities for disciplinary proceedings against trainmen and conductors? A. Yes.

Q. What is that? A. I review cases conducted by the trial office and make my recommendations to the superintendent.

Q. How long have you had responsibility for these disciplinary matters? A. For the past ten years.

Q. Now, prior to the letter agreement of June and December of 1973, were any individual trainmen, collectors or conductors taken out of service prior to a trial for run failures? A. Yes, they were.

Q. And under the present letter agreement for a third or fourth run failure, if the man exercises his right to appeal within ten days, is he removed from service? A. No, he is not.

Q. But prior to the letter agreements, individuals on a third or fourth run, failure, could be and were many time removed from service, pending the trial? A. They were.

Q. Mr. Dixon, can you explain for the record, please, what the problems to the railroad are from run failure?

Mr. Wexler: I object to that. I think it is immaterial.

The Court: I will let him answer briefly.

I have heard argument about it before, and I'd rather that it be testimony.

A. Well, if it is a conductor that fails to cover the assignment, there is the possibility of delay to a train, and even cancellation.

If the company is made aware of the failure by supervision in the area or a crew member, or an engineer saying, "I have no conductor," if we become known of it, we can obtain a conductor from the qualified crew.

We might put in an engineer and make it his responsibility to move the train.

Sometimes, if unknown to proper supervision, there could be a delay to passengers and so forth.

Q. Over and beyond the delayed train, is there at any time an additional financial cost to the railroad? A. Many times when you move a man up, there is additional cost, and you try to cover brakeman's assignments, you have to bring out a man and pay time and a half.

Q. So, run failures, can, and have cost the railroad penalty wages, in effect? A. Yes.

Mr. Stokes: Thank you.

The Court: Any cross?

Mr. Wexler: Yes, your Honor.

Cross Examination by Mr. Wexler:

Q. Mr. Dixon, I understand that you have serious and minor charges against employees; correct? A. That's right.

Q. In other words, a serious charge, what you consider serious, or the company considers serious, the man is suspended immediately, pending a hearing? A. That is correct.

Q. And minor charges, he is advised in writing and has a hearing—he is not suspended? A. If he has displayed a habitual fault, we will, on a minor charge, suspend him.

Q. A run failure is a minor charge on the first and second, prior to the letter agreement of 1973? A. Prior to June of last year, when the run failures—the letter of agreement went into effect, possibly, yes, we might consider, maybe the first or second one a minor offense.

Q. So, the changing of rules of the letter agreement didn't give greater rights with respect to the first and second run failures? A. Well, before the first letter of agreement of June 1973, a man could stand trial on a first and second run failure.

Q. Didn't you tell us it was considered a minor on the first and second? A. Yes, but we held trials.

Q. But it was considered a minor offense on the first or second run failure? A. Yes.

Q. Now, you read the record that comes up to you from the hearing officer, on the third, fourth and fifth run failure, isn't that right? A. Are you talking about prior to the June agreement?

Q. No, after. A. No. The only one I do read is the fifth one, the dismissal.

Q. Who reads the third and fourth? A. That's handled by the arbitration board. They have a right to appeal the third and fourth offense.

Q. You handle the fifth one? A. Yes.

Q. And you know the procedure followed during the hearing? A. Yes.

Q. Who makes decisions whether certain evidence will or will not come in? A. All evidence presented at a hearing, the trial officer is allowed and marks it down as an exhibit, either for the carrier or an exhibit for the defendant.

Q. Assuming the trial officer does not want to accept it, can he rule it out? A. I have never seen a time when an exhibit has been ruled out.

Q. Have you ever seen such a notation? A. No.

Q. Do they put notations in the record that it was ruled out? A. If there is something there not relative to the charge, it might be.

Q. Have you ever seen in the record where something was ruled out by the trial officer?

In other words, the labor representative says, "I'd like to offer Exhibit A" and the trial officer says, "No." A. If it is not relative to the case.

Q. You have seen that? A. Yes.

Q. So, the trial officer rules on admissibility? A. Yes.

Q. And certain questions asked by the labor officer, the trial officer will say "I'm not going to admit that"? A. Yes.

Q. So, he rules on the acceptance of certain evidence? A. Yes. If it is not relevant to the case—

Q. Who makes that determination? A. The trial officer.

Q. And you don't get it because he ruled it out? A. Yes.

Q. Did you ever reverse a case in your hearing on the fifth run, because the trial officer didn't allow something in that could have been helpful? A. We only got a couple of dismissals on the new procedure.

Q. Did it ever happen in any other trial? A. Yes.

Q. Did you call to see what was left out? A. If I may, many times previously, before this agreement, we conducted our own appeals as far as the superintendent.

The one time the discipline came to my hands—

Mr. Wexler: Your Honor, I am not interested in this.

The Court: All right. That's not responsive.

Q. So, you make the determination on the fifth run based upon what is given to you by the trial officer; is that correct? A. That's right.

Q. Does he make any recommendations? A. He does not.

Q. And the man whose case you are reviewing has been suspended before the hearing starts; is that correct? A. That is correct.

Q. He is fired before it starts? A. He is dismissed.

Q Before the hearing even starts? A. Yes.

Q. Then he has a hearing where a trial officer makes a determination as to what is admissible and what is not; is that correct? A. Yes.

Q. And you get the final results without seeing the individual, and you review what the trial officer submitted

in and make your determination? A. If there is evidence presented, I evaluate it.

In many cases, where conversations allegedly took place, I sat for hours and listened to tapes, and made my decision after.

Q. How many fifth run failures have you heard since the new rules went into effect? A. Four.

Q. Any reversals? A. No reversals.

Q. No reversals? A. Two were held in absentia. The man disappeared and never came back, and the other two are before the Arbitration Board.

Q. There was some testimony—

The Court: You mean the American Arbitration Association?

The Witness: Yes. They have the last say in this.

Q. There were some statements made to the Court that if a man calls in and he is sick, that is not a failure, a run failure.

Were you in court when that was said? A. Yes, I was.

Q. Is that true? A. It is true to the extent that if a man can prove disability, the run failure is withdrawn.

Q. Doesn't he have to give three hours' notice? Even if he is sick, it will count as a run failure unless he gives three hours' notice? A. It is considered a run failure, unless there is three hours' notice.

Q. And most men have to report at five or six o'clock in the morning? A. They have to report at approximately anywhere from a half hour to an hour before the assignment starts.

Q. When does it usually start? A. Where the assignments all are, from ten minutes to an hour.

Q. Most of them report in the morning? A. In the morning, afternoon and night.

Q. Those in the morning have to give notice that they are sick or in the hospital three hours before time to report, otherwise it is considered a run failure? A. Unless he produces valid information.

Q. It is considered a run failure unless three hours' notice is given?

The Court: I heard enough.

He said less than three hours' notice is a run failure, and you are trying to get him to say they'd have to give notice at three in the morning and not everybody reports at six A.M.

Mr. Wexler: Thank you.

Cross Examination by Mr. Higgins:

Q. Mr. Dixon, under these new agreements, when the employees are brought in for discipline, what part of the record is examined, what part may be considered by the supervisor, or whoever talks with him as a result of the run failure? A. The previous run failures are looked at. That's all.

Q. Just run failures? A. Yes, sir.

Q. So, when a man is brought in under the new procedure for run failures, the only part of his performance record that may be considered, are his run failures? A. Yes.

Q. Prior to this agreement, if someone was brought in for a first, second or third run failure, or whatever the

charge was, is it not a fact that every bit of his prior performance and all prior discipline, could be taken into consideration and used as a base for the discipline to be imposed? A. Yes. If he was a habitual, yes.

The Court: What other types are there?

The Witness: Desertion from your assignment, stealing company money, violation of rulings, violations of operating rules.

Q. Failure to make reports on time? A. Yes.

Q. So that prior to this, all that could be taken into consideration, but under this agreement, all that can be considered is a run failure? A. Right.

Q. And under this agreement, before he can be discharged, five run failures have to have been committed in one year? A. Yes.

Q. Suppose the fifth one comes up in the thirteenth month? A. It converts back to the thirty days.

Q. So, it would convert back to the fourth, and he would have to have five within the twelve months? A. Yes.

Q. Now, Mr. Wexler asked you before about the three hour notification.

You worked for the railroad many years, and were a trainman? A. Yes, sir.

Q. And you worked in and with the union for many years, before you became a supervisor.

In all the time you were there, could you tell us whether there was ever an occasion where somebody with a valid excuse for being late—"I had to take my wife to the hospital", or "My car broke down on the Meadowbrook Park-

way"—and he could supply documents and you didn't hear about it until an hour or two after the time of reporting, would he be punished for a run failure? A. No, sir.

Q. So, at any time, when somebody came in with a valid excuse for the failure, though technically it is referred to as a run failure, isn't that run failure, as a matter of practice, washed out? A. Yes, sir.

Mr. Wexler: Objection.

The Court: Overruled.

Redirect Examination by Mr. Stokes:

Q. Mr. Dixon, you have attended some of the hearings before the arbitrator, where appeals have been taken? A. No, sir, I have not.

Mr. Stokes: I would ask leave to present one more witness.

The Court: I am going to ask for an offer of proof on that.

Recross Examination by Mr. Haefeli:

Q. Mr. Dixon, when did the Metropolitan Transportation Authority take over the Long Island Railroad?

Mr. Stokes: Sometime in January, 1966.

Q. Mr. Dixon, isn't it a fact that at the present time, the Long Island Railroad is under Court order not to enforce Rule J from the Rules of Procedure of Long Island Railroad based on possible Constitutional rights of the employees? A. Rule J, yes.

The Court: What is that?

Mr. Stokes: The grooming standard.

Mr. Higgins: I'd like to know the point of the question.

The Court: I think it would militate against the remand, showing that the Federal Court—

Mr. Haefeli: It was decided by Judge Costantino as a Federal matter.

Mr. Stokes: I have spoken with Hugh Thancey, who represents a matter before the American Arbitration Association, and anyone taking an appeal for the arbitrator, where he has offered something to the trial Judge, and it is excluded, he has the opportunity to offer such material and have it considered by the American Arbitration Association and have it offered to the impartial arbitrator.

Mr. Haefeli: I submit that is irrelevant.

The Court: I think that really doesn't answer Mr. Haefeli's question as to whether a due process hearing after dismissal—

Mr. Haefeli: Exactly, your Honor.

The Court: Would you stipulate that it is a fact, without my hearing evidence, that the American Arbitration Association will receive evidence so it is excluded before the trial hearing officer?

Mr. Stokes: I would like to submit an additional citation.

The Court: Well, wait a minute. Mr. Haefeli, I think, wants to say something.

Mr. Haefeli: No, I don't have anything, your Honor.

Colloquy

Mr. Stokes: I would like to submit a citation that slips my mind. I can't remember the case, but it held—it's a Federal case—that due process before the impartial arbitrator, will cure any defects in the proceedings below, in the company, and that the hearing before the impartial arbitrator constitutes complete due process.

The Court: Well, find the case, and send me a letter, with a copy to Mr. Haefeli or Mr. Wexler.

Mr. Higgins: Mr. Haefeli has referred to Constitutional rights—

The Court: He is talking about the United States Constitution.

Mr. Haefeli: And New York State.

Mr. Wexler: May I call one witness?

The Court: Tell me what you want him to testify to?

Mr. Wexler: I want to call Mr. Mills, who handled the disciplinary proceedings for the union, and ask him what went on, and how the trial officer made rulings and excluded testimony, and excluded exhibits.

The Court: I have the transcript here.

Mr. Wexler: That's void and many times, an objection is made, it is left out.

That is one particular case.

We are talking about the fair trial of the hearing officer, and we claim he is the hearing officer.

The Court: Well, you have established from Mr. Dixon that the hearing officer may exclude exhibits or questions he thinks irrelevant.

Mr. Wexler: And I'd like to state that as to the labor representative, he never got a ruling in his favor, and he has been told "I'm the hearing officer."

The Court: You get someone who says one hundred percent of the time over five years, he never got a ruling in his favor.

Mr. Wexler: Mr. Mills.

RAYMOND J. MILLS, having been first duly sworn by the Clerk of the Court, was examined and testified as follows:

The Clerk: State your name for the record, please?

The Witness: Raymond J. Mills, M-I-L-L-S.

Direct Examination by Mr. Wexler:

Q. Mr. Mills, how long have you been employed by the Long Island Railroad? A. About 20 years.

Q. How long have you been an officer of the union? A. Almost for four years.

Q. And in those four years, did you represent the union in representing men in disciplinary proceedings? A. Yes.

Q. And how many disciplinary proceedings did you actually attend as a representative of the union? A. 200, 250, I don't know.

Q. As the representative, did you make certain objections to evidence offered? A. Yes.

Q. Were you ever permitted, or sustained by the trial or hearing officer? A. Would you repeat that question, please?

Q. Were you ever sustained as to your objections by the trial officer? A. No.

Q. The trial officer would offer something in evidence, and you would object to it, as the representative and did he ever reverse himself? A. Not that I can remember.

He would generally say "The record will note your objection."

Q. Did he ever tell you you could not offer certain things in evidence? A. As recently as last week.

Q. Has there been many times where he refused to allow in evidence what you thought relevant to the case? A. In areas where I pursued certain matters, I would be told "That is not relevant" and that I should not pursue it.

I try to show motive or intent, I am cut off and I am told "That's not relevant."

Q. Do you have a recent case where a man claimed he was in the hospital, and therefore missed his run, and verification was submitted to the union, and they still took that as a run failure? A. Yes.

Q. What case is that? A. Kenneth Barton.

Q. How long ago was that? A. His case was heard before the American Arbitration Association on Sep. 3.

The Court: What did they do?

The Witness: As yet, I don't know.

Q. But it was counted as a run failure, and did he submit proof that he was in the hospital? A. Yes.

The Court: I am not going to try that case. It is before the American Arbitration Association.

Anything more?

Mr. Wexler: Nothing.

Raymond J. Mills—for Plaintiff—Cross

Cross Examination by Mr. Stokes:

Q. Mr. Mills, in dealing—you have represented people before the American Arbitration Association? A. Yes, sir.

Q. Have you had occasion to offer material to the American Arbitration Association which was rejected by the trial examiner? A. No, sir.

The Court: Never offered it?

The Witness: It has never been rejected, but I have often offered it.

Q. I am asking about material rejected by the examiner, which you offered to the arbitrator. A. I have never been refused material that I offered to the arbitrator.

The Court: In other words, the material was refused by the arbitrator but not by the railroad?

Q. You testified you had hearings or trials on the company level, where material was excluded? A. Yes.

Q. Have you proceeded with those cases before the arbitrator? A. Yes.

Q. And at that hearing before the arbitrator, the material excluded from the company file, did you tender it to the arbitrator? A. Yes, and it was objected to by the carrier representative, in that it was not submitted at the time of trial.

Q. Did the arbitrator receive it? A. I don't know. It was verbal. I don't know how much weight he gave it.

Q. But was it listened to? A. Yes.

Mr. Stokes: Nothing further.

Raymond J. Mills—for Plaintiff—Cross

Cross Examination by Mr. Higgins:

Q. Are you a member of the board of adjustment? A. I believe you mean the committee of adjustment—yes.

Q. As a member of the Board, do you have the right to call for a meeting of the Board of Adjustment? A. Yes.

Q. Did you ever call for a meeting of the Board of Adjustment? A. Yes.

Q. Did you ever call for a meeting of the Board of Adjustment? A. No.

Q. When you joined the organization, didn't you swear, and sign a statement that you would comply and support the Constitution of the United Transportation Union? A. Yes.

Q. Does that include appeal? A. Yes.

Q. Did you comply with that?

Have you taken the steps set forth in the Constitution of the organization to appeal the actions of the general chairman of the general committee of adjustment? A. Yes.

Q. When did you do that? A. I flew to Cleveland.

Q. When did you file your appeal—

> The Court: You flew to Cleveland when?
>
> The Witness: I believe in 1973, over another matter.
>
> The Court: Not on this matter?
>
> The Witness: No. The reception which I—the manner in which I was received, and the letter I got from Cleveland indicated I would not get any satisfaction at all.

Q. You came to that conclusion. You didn't file an appeal or support the action you take now? A. It was almost impossible to do this.

Raymond J. Mills—for Plaintiff—Redirect

Q. Answer my question—yes or no? A. No.

Mr. Haefeli: On what the gentleman just raised, may I ask a couple of questions?

The Court: Yes.

Mr. Wexler: Just a few, your Honor.

Redirect Examination by Mr. Wexler:

Q. Mr. Mills, were you on the general committee in 1972 and 1973? A. Yes.

Q. Prior to June 4, 1973, prior to the letter of agreement, did the general committee meet? A. Yes.

Q. Did you ever discuss the contents of the letter of June 4, 1973? A. No.

Q. Did the committee meet after June 4 and before December 14? A. Yes.

Q. Did they ever discuss the contents of the letter of December 14, the letter of agreement, 1973? A. No.

Q. When did you find out about these letters of June 4 and December 14, 1973, the letters of agreement concerning the change in procedure? A. Sometime after they went into effect. Mr. Dixon may be aware of it.

Mr. Wexler: Thank you.

Redirect Examination by Mr. Haefeli (Continuing):

Q. Mr. Mills, did you receive a letter dated December 24, 1973, from the president of the Transportation Union? Exhibit G, I believe? A. Yes.

Q. Does that letter state that the union could not proceed against a person exercising rights granted under Federal or State law? A. Yes.

Mr. Haefeli: Thank you.

Raymond J. Mills—for Plaintiff—Recross

Recross Examination by Mr. Higgins:

Q. Mr. Mills, is the union proceeding against you in any way right now? A. No.

Q. So this letter isn't really—

The Court: Exhibit G is not the letter from the union, but a notice of discipline.

Mr. Haefeli: I am sorry—Exhibit C of the order to show cause to this Court.

The Court: That's a letter from Mr. Schlager to Mr. Pryor.

Mr. Haefeli: This is the letter you are talking about (indicating)?

The Court: Well, where is the original?

Mr. Haefeli: It would be this, your Honor.

Mr. Stokes: I would move to strike any reference to that letter, unless the letter to which it is in response, is also put into the record, because by its very nature, to understand the letter and what it means, you have to have the letter it is responding to.

The Court: It doesn't prove anything.

Recross Examination by Mr. Higgins (Continuing):

Q. Your question is—

The Court: Let's not run this on forever.

Q. You were a member of the board of adjustment?

The Court: You have had that already.

Mr. Higgins: He indicated—

Raymond J. Mills—for Plaintiff—Recross

The Court: Don't spend a lot of time.

If you have a relevant question, put it to the witness.

Q. At the time that you heard first about this letter, as you have testified, the very first time you heard about these letter agreements, was when? A. Sometime after it went into effect.

Q. When was that? A. I don't know.

Q. You don't recall? You have no idea?

Did you do anything or make an appeal at that time? A. It seemed to me it was too late. It was already a matter of fact.

Q. But you didn't make an appeal or call for another meeting? A. I made my feelings known.

Q. You were a member of the board. You know the rules and regulations—

The Court: Let's argue. He didn't call a meeting.

Mr. Stokes: I have one question.

Recross Examination by Mr. Stokes:

Q. Mr. Mills, did the railroad ever discuss a run failure on your part? A. Me, personally?

Q. Yes. A. Yes.

Mr. Stokes: That's all.

The Court: You may step down.

Mr. Wexler: We have a problem as to the contempt, the firing of the individual on his fifth run.

The Court: That is a question of law, and I'll decide it.

Colloquy

Mr. Haefeli: Is the stay issued by this Court still in effect?

The Court: Just what have I stayed?

Mr. Haefeli: Further disciplinary action.

The Court: Is there further—

Mr. Stokes: There is no further disciplinary proceeding, but Mr. Mills filed a notice of appeal for the American Arbitration Association and we will hold that up, pending decision of this Court.

If Mr. Mills wishes to proceed.

The Court: It is up to Mr. Mills whether he wants to go ahead with it or not.

Memorandum Opinion and Order

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

74 C 842

[SAME TITLE]

October 30, 1974

Appearances:

MEYER & WEXLER, Esqs.
Attorneys for Plaintiffs

By: RICHARD T. HAEFELI, Esq.
of Counsel

GEORGE M. ONKEN, Esq.
Attorney for Defendant
The Long Island Rail Road Company

By: RICHARD H. STOKES, Esq.
BRIAN J. BARRETT, Esq.
ARMAND J. PRISCO, Esq.
LAURENCE H. RUBIN, Esq.
of Counsel

THOMAS J. HIGGINS, Esq.
Attorney for Defendants other than
The Long Island Rail Road Company

Memorandum Opinion and Order

JUDD, *J.*

MEMORANDUM AND ORDER

The case is before the court on plaintiffs' motion to remand to the state court, plaintiffs' motion for a preliminary injunction (originally made in the state court) and the motion of defendant Long Island Rail Road Company (Long Island) for dismissal of the complaint (originally made in the state court). There is also an informal motion for contempt against the Long Island for alleged violation of the stay in the state court's initial order to show cause. Affidavits submitted in the proceeding were supplemented by testimony from witnesses and by numerous exhibits.

The controversy relates to the procedures for disciplining employees of the Long Island for "run failures"; *i.e.*, for unexcused absence from duty at the time the employee's train is due to depart.

FACTS

The complaint asserts that plaintiff Mills received a suspension of 15 days for a third run failure and 30 days for a fourth run failure without any hearing and that plaintiff Simmons was dismissed for a fifth run failure.

Mills is Local Chairman-Passenger of Local 645 of the United Transportation Union (T) and a member of its General Committee of Adjustment. He asserts that the disciplinary procedure is based on letter agreements modifying a formal collective bargaining agreement and that the letter agreements are invalid because they were made

by the General Chairman of the Local without approval by the General Committee of Adjustment or the members of the Union, and because they violate the constitutional rights which are applicable to Long Island as a corporation owned by Metropolitan Transit Authority, an agency of the State of New York.

As to Simmons, the additional claim is made that he was denied a fair hearing because the hearing was not granted until after the dismissal and because the same person acted as prosecutor and as hearing officer.

The action was begun in the Supreme Court, Suffolk County, where an order to show cause, with a stay against "any disciplinary action presently pending against the plaintiffs", was signed on May 20, 1974, returnable May 30, 1974. A hearing on the order to show cause, including plaintiffs' motion for a preliminary injunction and the Long Island's cross-motion for a dismissal of the complaint, was adjourned for two weeks by the state court. The Long Island motion was supported by an affidavit from the General Chairman of the United Transportation Union (T).

Before the adjourned hearing, Long Island filed a petition for removal. The motions pending in the state court were therefore argued here at the same time as the motion for remand.

The Long Island Rail Road Company is a common carrier engaged in interstate commerce and is subject to the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* All the stock of Long Island has been owned since January 1, 1966 by Metropolitan Transit Authority, a public benefit corporation of the State of New York. New York Public Authorities Law § 1266.

The Long Island and the Union entered into a collective bargaining agreement on February 17, 1972. The procedure concerning discipline is contained in Article 42 of the agreement, which specifies in paragraph (a) that "Employees shall not be suspended or dismissed from service without a fair and impartial trial." Article 42 further provides that an employee may be represented at the trial, that the employee and the General Chairman of the Union shall be supplied with copies of the trial record, that the decision of the Superintendent may be appealed for a hearing before an arbitrator appointed by the American Arbitration Association, and that an employee who has been held out of service and thereafter exonerated shall be reinstated with his seniority unimpaired and shall be compensated for the earnings he would have received. The testimony showed that the AAA arbitration proceedings are not limited to the evidence received at the employees' trials.

A new agreement concerning run failures was made on June 4, 1973 in the form of a letter signed by the President of the Long Island and the General Chairman of the Union. This letter stated:

> It is agreed that such discipline will be assessed on the following schedule:
>
> 1. First run failure, "talk session" with the appropriate Assistant Superintendent or his representative.
> 2. Second run failure, record assessed with a "reprimand."
> 3. Third run failure, an actual fifteen (15) days' suspension.

4. Fourth run failure, an actual thirty (30) days' suspension.

(It is understood that repeated run failures can result in the successive imposition of the discipline specified in either steps 1, 2, 3, or 4, subject only to the restrictions of the twelve-month period referred to herein below.)

5. Five (5) run failures within any twelve-month period will result in the employe's dismissal.

No formal investigation (or trial) will be held on any of the aforestated five (5) steps. However, if the employe desires, he may appeal the discipline imposed in steps 3, 4, and 5 in accordance with the provisions of Article 42(k) of the Working Agreement provided he notifies the Superintendent-Personnel Management within ten (10) days of the date the assessed discipline becomes effective.

This letter agreement was modified by a second letter signed by the President of the Long Island and the General Chairman of the Union dated December 14, 1973, which stated that an employee may be accorded a formal hearing if he desires before he can be permanently discharged under Step 5.

Before these letter agreements, according to the uncontradicted testimony, an employee could be dismissed or suspended for his first run failure, and Long Island could count run failures for his entire career and not just for the past twelve-month period.

The Union constitution gives the General Committee of Adjustment authority "to make and interpret agreements

with representatives of transportation companies covering rates of pay, rules, or working conditions * * * " (Article 85). Article 87 of the constitution provides that the Chairman of the General Committee of Adjustment shall be its executive head, and that any member of the Committee may request the Chairman to convene the General Committee. Internal appeal rights of members are set forth in Article 75 of the Union constitution, which specifies that an officer or member of a local may appeal an action of the General Chairman to the General Committee of Adjustment, and that an appeal from a decision of the General Committee of Adjustment may be made to a Board of Appeals. No internal review of the 1973 letter agreements was sought by either Mills or Simmons. Mills admitted knowing of them.

Mills has appealed his suspensions to the AAA. Proceedings are presumably in abeyance pending the determination of this case.

Simmons was granted a hearing after his dismissal. Testimony given before William M. Glennon, Assistant Trainmaster, showed that there was no dispute concerning his first four run failures during a twelve-month period, but that he contended concerning the fifth run failure that he should be off on Saturday, March 23, 1974, because he was scheduled for a vacation the following Monday, and that he had telephoned the crew dispatcher on Friday to confirm this fact.

Mr. Glennon submitted the transcript and exhibits of his hearing, without any recommendation, to L. W. Dixon, Assistant Superintendent-Passenger, who reviewed the record and submitted it to Joseph C. Valder, Superintendent

of Transportation, with a recommendation of dismissal. In view of Simmons' claim that he had called in for permission to be absent from his Saturday run, Mr. Dixon had listened to the tapes of the crew dispatcher for a three-hour period on Friday evening in the company of Mr. Glennon and two representatives of the Union. After Mr. Simmons at the trial described a different time for his telephone call, Mr. Dixon listened to another six hours of tape, and found no record of the alleged conversation.

Plaintiff Mills' claim of contempt is raised in the plaintiffs' memorandum of law, which asserts that he was relieved of his duties on June 1, 1974, after a fifth run failure, and was notified by letter of his dismissal. The Long Island's memorandum of law asserts that the fifth run failure was on May 31, 1974, after the date of the state court order to show cause. Mills testified before the court, but neither party questioned him about the fifth run failure or the dismissal.

Discussion

1. While the complaint refers to rights under the New York State Constitution and does not cite any basis for Federal Court jurisdiction, it does disclose that the controversy relates to discipline against employees of the Long Island and that discipline is covered by a collective bargaining agreement. A Federal court may look to facts outside the complaint, set forth in the petition for removal, to determine whether the complaint really asserts a federal right. *Fay* v. *American Cystoscope Makers,* 98 F. Supp. 278, 280 (S.D.N.Y. 1951).

Congress has provided for removal of actions asserting a federal right, stating in 28 U.S.C. 1441(b):

> "Any civil action of which the district courts have original jurisdiction founded on a claim or rights arising under the constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties."

In determining that the court may look beyond the complaint to determine whether a Federal right is involved, Judge Ryan said in the *Fay* case that "to hold otherwise would vest the plaintiff with power to withhold from a defendant the use of that forum which Congress has chosen to make available." (98 F. Supp. at 280). The court may therefore consider that plaintiffs have rights under the Railway Labor Act.

2. The relations between railroads and their employees are covered by the Railway Labor Act, 45 U.S.C. §§ 151, *et seq.* A National Railroad Adjustment Board was created under 45 U.S.C. § 153 First, with members selected by carriers and by employee organizations and with jurisdiction over disputes involving employee grievances. The Supreme Court has held that the "statutory grievance procedure is a mandatory, exclusive, and comprehensive system for resolving grievance disputes." *Brotherhood of Locomotive Engineers* v. *Louisville and Nashville Railroad Co.*, 373 U.S. 33, 38, 83 S. Ct. 1059, 1062 (1963). The *Brotherhood* case involved the disputed discharge of an employee involved in an assault on fellow employees. Claimants seeking reinstatement and back pay "are confined to their

administrative remedies. Courts have no jurisdiction over such claims". *Merinuk* v. *Baker,* 366 F. Supp. 735, 736 (E.D. Pa. 1973). Even cases asserting constitutional violations in procedure leading up to discharge must be determined in accordance with the provisions of collective bargaining agreements and the Railway Labor Act. *Dorsey* v. *Chesapeake and Ohio Railway Co.,* 476 F. 2d 243, 245, 4th Cir. (1973).

There is authority that an employee may sue for damages without exhausting administrative remedies, if he accepts his discharge as final. *Westermayer* v. *Pullman Co.,* 369 F. Supp. 631, 638 (N.D. Ill. 1973). Plaintiff Simmons has not accepted his discharge as final, however. In his complaint, he asks to be reinstated to his position as an employee and to have references to his violations removed from his personal files.

Even questions concerning the validity of a labor contract relating to railroad employees involve a federal question. *Roberts* v. *Lehigh and New England Railway Co.,* 322 F. 2d 219 (3d Cir. 1963). In the *Roberts* case the court stated (at p. 222) that the interpretation and application of collective bargaining agreements are within the "exclusive primary jurisdiction" of the National Railroad Adjustment Board. See also *Andrews* v. *Louisville and Nashville Railroad Co.,* 406 U.S. 320 (92 S.Ct. 1562 (1972)).

Petitioners rely upon *Glover* v. *St. Louis-San Francisco Railway Co.,* 393 U.S. 324, 89 S.Ct. 548 (1969) in support of their contention that the requirement to exhaust administrative remedies is not applicable here. That case, however, charged that the employees were victims of "invidious racial discrimination" in job assignments, that their

efforts to present grievances to the union or to the railroad had been frustrated, and as the court stated (393 U.S. at 331, 89 S.Ct. at 552):

> Here the complaint alleges in the clearest possible terms that a formal effort to pursue contractual or administrative remedies would be absolutely futile.

It was the special nature of racial discrimination charges and the absence of real administrative remedies which excused petitioners in that case from exhausting non-judicial remedies.

Plaintiffs here also cite *Vaca* v. *Sipes,* 386 U.S. 171, 185 S. Ct. 903, 914 (1967), an N.L.R.B. case, to show that there are exceptions to the rule that there must be exhaustion of remedies. That case, however, involved a breach of the union's duty of fair representation. Even if the same rule were applicable to claims under the Railway Labor Act cases, it would not help plaintiffs here, since *Vaca* turned on the nature of the particular breach of duty in that case.

Whether the Long Island should be treated as a private corporation, as it asserts, or as a public corporation, as plaintiffs assert, makes no difference in the result. Even a state-owned railroad is subject to the provisions of the Railway Labor Act. *California* v. *Taylor,* 353 U.S. 553, 77 S. Ct. 1037 (1957).

3. Insofar as the plaintiffs allege claims against the Union officials, their action is premature for failure to exhaust internal union remedies. *International Association of Machinists* v. *Gonzales,* 356 U.S. 617, 78 S.Ct. 923 (1958); *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen,* 323 U.S. 210, 65 S.Ct. 235 (1944).

4. With respect to the charge of contempt, Mills complains that he was dismissed after the state court order to show cause. It appears that the dismissal was for a run failure committed on May 31, 1974, which could not have been a "disciplinary action presently pending" when the state court order to show cause was issued.

If Mills is successful in his arbitration proceedings concerning the third and fourth run failures, then the May 31 incident will not be a fifth offense, and his dismissal may be subject to challenge. If he is reinstated, the collective bargaining agreement protects his right to recover compensation for his period out of service.

There may be an arguable question whether the Long Island should have treated the third and fourth run failures as established, in the light of the arbitration proceedings and the order to show cause, but that is a question which can be determined on review of the dismissal order. The court will not make any finding of contempt where the facts appear only in unsworn memoranda of law.

It is not necessary, therefore, to determine whether the stay in the state court's order to show cause was a nullity, as asserted by the Long Island. *In re Green,* 369 U.S. 689, 692, 82 S. Ct. 1114, 1117 (1962).

It is Ordered that the plaintiffs' motion to remand be denied; that the defendants' motion for summary judgment be granted; that plaintiff Mills' motion to hold the Long Island in contempt be denied; and that judgment dismissing the complaint be entered by the Clerk of the Court.

ORRIN G. JUDD
U.S.D.J.

Judgment Appealed From

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

RAYMOND MILLS & HARRY F. SIMMONS,

Plaintiffs,

—against—

THE LONG ISLAND RAIL ROAD COMPANY and HAROLD J. PRYOR, THOMAS J. BUTLER, WALTER DAY, MERRILL J. PIERCE, MARTIN BURKE, JAMES MOON, and SAL BARBUTO, constituting a majority of the Officers of the UNITED TRANSPORTATION UNION (T),

Defendants.

A memorandum and order of the Honorable Orrin G. Judd, United States District Judge, having been filed on November 1, 1974, denying the plaintiffs' motion to remand, granting the defendants' motion for summary judgment, denying plaintiff Mills' motion to hold the Long Island Railroad in contempt and directing the Clerk to enter judgment dismissing the complaint, it is

ORDERED and ADJUDGED that the complaint is dismissed.

Dated: Brooklyn, New York
November 1, 1974

LEWIS ORGEL
Clerk

Notice of Appeal

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

RAYMOND MILLS & HARRY F. SIMMONS,

Plaintiffs,

—against—

THE LONG ISLAND RAIL ROAD COMPANY and HAROLD J. PRYOR, THOMAS J. BUTLER, WALTER DAY, MERRILL J. PIERCE, MARTIN BURKE, JAMES MOON, and SAL BARBUTO, constituting a majority of the Officers of the UNITED TRANSPORTATION UNION (T),

Defendants.

SIR:

Notice is Hereby Given that RAYMOND MILLS, a plaintiff in the above-captioned action, hereby appeals to the United States Court of Appeals for the Second Circuit from so much of the final judgment entered in this action on November 1, 1974, as directs judgment dismissing the complaint.

Dated: Queens, New York
November 21, 1974

Yours, etc.

KEVIN P. QUILL
Attorney for Plaintiff
Raymond Mills
32-21 Broadway
Astoria, New York 11106

To:

GEORGE M. ONKEN, Esq.
THOMAS J. HIGGINS, Esq.

GROSBY-LODER PRESS, INC., 130 Cedar St., New York, N. Y. 10006 BE 3-2336
(5150—50268)

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

REGINA WEINKOFF, being duly sworn, deposes and says that deponent is associated with the attorney for the plaintiff herein.

That on the 7 day of February, 1975 deponent served the within Appendix

upon the attorneys for the defendants by depositing a true copy of the same securely enclosed in a post-paid wrapper in a Post Office Box regularly maintained by the United States Government at #100 Church Street, in the City, County and State of New York directed to said attorneys as follows:

George M. Onken, Esq., Attorney for Appellee, Long Island Railroad Co.
Jamaica Station, Jamaica, New York

Thomas J. Higgins, Esq., Attorney for Appellee, United Transportation Union
200 So. Service Road, Roslyn Heights, N.Y.

those being the respective addresses within the State designated by them for that purpose upon the preceeding papers in this action, or the respective places where they then kept an office between which places there then was and now is a regular communication by mail.

Deponent is over the age of 18 years.

Regina Weinkoff
Regina Weinkoff

Sworn to before me this

7 day of February, 1975

ROSE KARTELL
Notary Public, State of New York
No. 41-7167585
Qualified in Queens County
Commission Expires March 30, 1976

Rose Kartell